

# **Liberal Constitutionalism: Re-thinking the Relationship between Justice and Democracy**

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February, 2010**

## **Abstract**

Liberal constitutionalism is a dominant approach to contemporary political and democratic theory. A defining feature of liberal constitutionalism as it has been outlined by some of its proponents (Rawls: 1996, 1999a and Barry: 1995) is a commitment both to pre-political standards of justice and to the claim that democracy expresses the sovereignty of the people. Combining pre-political rights with the sovereignty of the people seems contradictory. The difficulty is how the people can be fully sovereign if they are constrained by rights outside the reach of popular sovereignty. Because both justice and democracy are foundational to liberal constitutionalism, this contradiction threatens to undermine the plausibility of the entire theory. If liberal constitutionalism fails, this calls for a re-thinking of how to conceptualize the relationship between justice and democracy in contemporary liberal thought. This thesis asks: how can liberal constitutionalists sustain their double commitment to justice and democracy? To answer this question I address three central questions for liberal constitutionalists concerning democracy. First, what is the role of reason in their theories; second, what type of democracy are they committed to; third, I question the role of civil and political rights in democracy. On the first question, I argue that a weak notion of public reason will serve liberal constitutionalism best. Furthermore, liberal constitutionalism fits best with a model of democracy emphasising deliberation combined with a weak notion of the common good. Finally, some of the underlying thinking behind both civil and political rights and democracy is derived from the same sources, which reduces the conflict between justice and democracy. Through an examination of these questions, I show that the critics of liberal constitutionalism often overstate the difficulties of combining justice and democracy. This warns us against an outright rejection of the tenets of liberal constitutionalism as is recommended by some critics.

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## ACKNOWLEDGEMENTS

The work on this thesis started optimistically in October 2006. At that time the three years ahead until I was supposed to submit seemed like an immensely long time. Surely, three years is a fairly long time, but there is no doubt that the time has passed only too quickly. Although this project is now completed, during these three years the life of this thesis has experienced many ups and downs. Luckily I have had the fortune of benefitting from the help of so many people in completing this project. Without their encouragement and help it would have been impossible to finish.

First I would like to thank my supervisor Matt Matravers for his continuous support and encouragement throughout these three years. Matt has patiently read and commented on my rough and often inarticulate drafts, and always constructively helped me to articulate my often-infant arguments more clearly. Matt has not only helped me through the process of writing this thesis but he has also been a model scholar and inspired me to continue even at times when I did not seem to be making any progress.

I would also thank my backup supervisor Matthew Festenstein who at various stages has offered valuable feedback on my thesis and helped me refine my arguments further. In addition, I am extremely grateful to Sue Mendus who read a nearly complete draft of my thesis and gave detailed and extensive written comments helping me both to clarify my thinking on many of the points made in this thesis and to make the structure and argument much clearer.

The Department of Politics at York has offered a great environment to work on this thesis and without its encouraging and friendly atmosphere writing this thesis would have been a much harder task. Various drafts of some of the work in this thesis have been presented in workshops and reading groups in the Department and I want to thank everyone participating for taking the time to read my work and for helpful questions and comments.

In York I have also been fortunate enough to be surrounded by many good friends and coursemates whose support and encouragement have been invaluable. I would particularly thank Alfonso Donoso, Tim Fowler, Kei Numao, Yidan Tan, Mike Wood, Britain Brady and Chiayu Chou for reading and commenting on my work and

for being such good friends. Without you the time in York would have been dull and boring.

Finally, I am grateful for the warm support and encouragement from all my colleagues at NLA University College in Bergen. I would particularly thank Åshild Samnøy and Lars Gaute Jøssang for encouraging me and helping me keep up the momentum together with teaching and other responsibilities. I am also grateful for some good suggestions by Ruth Mjanger towards the very end. Without the understanding and strong support from my colleagues at NLA during the months just before my submission this project would have been much harder to complete. With their continuous support the transition from PhD studies to teaching has been smooth and pleasant.

## **AUTHOR'S DECLARATION**

I hereby declare that all the material contained in this thesis is based on my own research.

## INTRODUCTION

Is it possible to combine justice and democracy into a coherent political order? Liberal constitutionalism suggests so. There are two foundational features of liberal constitutionalism that suggest this possibility. First, liberal constitutionalism is defined by a political order based on a constitution outlining the workings of the political system including a set of civil and political rights derived from principles of justice. Second, it holds that democracy and the sovereignty of the people is an integral part of a legitimate political order. Holding both these propositions seems contradictory and untenable; it is difficult to maintain both an ideal of justice relying on pre-political commitments whilst at the same time being fully committed to the ideal of the people as fully sovereign. This contradictory feature gives rise to a dilemma for liberal constitutionalism: If justice requires pre-political rights outside the reach of democracy, this undermines the idea of democracy understood as the people being fully sovereign, and if democracy excludes pre-political rights this undermines liberal justice understood as a commitment to rights out of reach of democracy. Either liberal constitutionalism must choose justice over democracy, or choose democracy over justice. Holding on to the idea that both justice and democracy are equally important seems untenable. The central aim of this thesis is to analyse how this dilemma can be resolved. I will not suggest a solution that will once and for all resolve this dilemma, but I will suggest some ways in which the tension between justice and democracy can be eased based on contemporary theories of justice and democracy.

Liberal constitutionalism has for long been a dominating force in theorizing about both justice and democracy. It has not only been influential but has for long been labelled as a successful way to organize political life under modern conditions more generally. Despite its widespread influence and dominance, many theorists are now questioning the seriousness of its democratic credentials. Both the defining features identified above are subject to criticism. First, some political theorists argue that liberal constitutionalism is unable to accommodate the increasing diversity and pluralism found in modern societies. Its strong commitment to pre-political principles of justice makes it insensitive and unable to respond adequately to political claims based on (among others) culture, identity, religion, race, ethnicity and gender. In addition, liberal constitutionalism has been criticized for not being sensitive enough to



the importance of citizen participation in the democratic process. Furthermore, these critics see the commitment to principles of justice as undermining the people as the authority of a society's positive law. The critics see the commitment to democracy as weak, because in case of conflict between the principles of justice and democracy, justice trumps the will of the people. For example, the critics hold that in a properly constituted liberal constitutional political order strong pre-political principles of distributive justice will trump the will of the people regarding re-distribution of wealth (Dahl: 1989, Dryzek: 2000). Liberal constitutionalism requires that the decisions made by the demos must comply with a liberal constitutionalist conception of re-distribution. Such constraints on the people's ability to authorize laws undermine the authority of democracy, because the scope of democratic decision-making is restricted. In short, this means that the people cannot be fully trusted and given full authority to underwrite their own laws. Accordingly, this shows that the commitment to democracy is not serious.

If these criticisms are successful liberal constitutionalism loses its appeal as being able to deliver a just *and* democratic political order. Much political and democratic theory is based on the liberal constitutionalist approach and if it fails it warrants a thorough re-thinking of how to conceptualize the relationship between justice and democracy. To start with, I will define and discuss the ambitions of liberal constitutionalism in more detail. Then I will in the following section outline three of the main challenges facing liberal constitutionalism, before in the final section offering a brief overview of how this thesis addresses these challenges.

## **1. The Ideals of Liberal Constitutionalism**

This section first defines how I will understand liberal constitutionalism in this thesis, then traces the intellectual and historical roots of this tradition, and ends with a discussion of the ideals to which this definition and the intellectual tradition gives rise.

The two important defining features of liberal constitutionalism I take to be an equally strong commitment both to a set of civil and political rights derived from justice and that democracy and the sovereignty of the people is a foundational aspect of a legitimate political order. These two features will be supplemented in the next chapter with two additional propositions that play an important role in the contemporary debate: the significance of pluralism and the principle of liberal legitimacy. In the next chapter I will also discuss this understanding of liberal

constitutionalism in relation not only to civil and political rights, but also to social rights and distributive justice. A concern for distributive justice has been a defining feature of some forms of liberal constitutionalism, most notably John Rawls' theory of justice (1999a), but also Ronald Dworkin's liberalism (1981a and 1981b) and Brian Barry's contractualism (1989, 1995, 2001 and 2005). Liberal constitutionalism belongs to liberalism and is distinguished from other forms of liberalism by insisting on the importance of a constitution where the basic workings of the democratic system and the set of fundamental civil and political rights are defined.

The set of civil and political rights emphasizes values such as equality and liberty, which I take to be two of the important underlying values of liberal constitutionalism (more about these values below). Fundamental rights in this thesis are understood in the following way: 'political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law' (Rawls: 1999a: 53). These rights are fundamental in the sense that they seek to protect a person's basic interests, whatever his conception of the good may be. Thus, it is supposed that it will be in any person's interest to have a right to influence the political process of society and to have the liberty of freedom of thought and religion, and to have his integrity protected. I do not take this list to be an exhaustive definition of the civil and political rights presupposed by liberal constitutionalism, but more as indicating what these rights entail. The definition and understanding of fundamental rights outlined above is how liberal constitutionalism and fundamental rights will be understood in this thesis. It is possible to see that this understanding is also reflected in the historical roots of this branch of liberalism.

In the contemporary debate on liberalism, many trace the intellectual roots of liberal constitutionalism to two distinctive and transforming periods of European history: the Reformation and the Enlightenment, and distinguish between Reformation liberalism and Enlightenment liberalism. Both periods gave rise to dramatic social and political changes. The Reformation constituted a definitive break with the middle ages and the supreme religious authority of the pope. Two outcomes of this process had a significant impact on the development of liberal political thought. The first was how to accommodate the new situation of religious pluralism, and the second was how the

downfall of papal supremacy gradually led to a development of absolute monarchies (Skinner: 1978: 113). Traces of these influences are present in both the philosophies of Thomas Hobbes (1651) and John Locke (1689), whose works have strongly influenced the development of liberal constitutionalism.<sup>1</sup> Thus, the historian of political thought Quentin Skinner argues that towards ‘the beginning of the seventeenth century, the concept of the state... had come to be regarded as the most important object of analysis in European political thought’ (1978: 349). In support of this conclusion, he quotes Hobbes’ statement in *De Cive* that ‘civil science’ aims ‘to make a more curious search into the rights of states and duties of subjects’ (quoted in Skinner: 1978: 349). The importance of identifying the proper scope of rights and duties between the sovereign and the subjects here emphasized by Hobbes echoes an important concern in liberal constitutional thinking regarding the proper limits of the state and the political obligations the subjects have towards the state. This theme is further explored in Locke who presented an influential and classic formulation of constitutionalism which located political authority in the ‘body of the people’ (quoted in Skinner: 1978: 338). These developments gave rise to influential ideas about a political order based on the ideas of consent, a constitution and a democratic order.

In Locke’s words, men are ‘free, equal and independent’ and ‘no one can be... subjected to the Political Power of another without his own *Consent*’ and furthermore, ‘[W]hen any number of Men have so *consented to make one Community*... the *Majority* have a right to act and conclude the rest’ ([1689] 1988: 330-331). Locke emphasizes the significance of liberty and equality, both important building blocks in liberal constitutional theories of justice, and through his commitment to majority rule simultaneously gives importance to democracy. We see even here that Locke is committed to both an ideal of justice and an ideal of democracy.

The importance of briefly surveying this starting point of liberal constitutionalism is twofold. First, these developments form an important background to understanding contemporary theories of liberal constitutionalism, such as the one advanced by John Rawls’s (1999a, 1996). Second, and as we will see in later chapters, that in the contemporary debate on liberalism many argue for rejuvenating the ideals of Reformation liberalism to answer many of the challenges to liberal

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<sup>1</sup> It is of course debatable to what extent Hobbes should count as a liberal, but the main point here is more that he has exercised influence on the development of liberal thought rather than the exact categorization of his philosophy.

constitutionalism present in contemporary societies. In the next section the significance of these challenges for liberal constitutionalism is discussed in more detail.

The second transforming period that was pivotal in the development of liberal constitutionalism was the European Enlightenment, during the eighteenth and nineteenth century. This period gave rise to a double revolution in both politics and industry which in distinct ways transformed political, social and economic life (Hobsbawm: 1962). The French and American revolutions succinctly symbolize the political transformations taking place in this period, and the industrialisation and emerging capitalistic organisation of the economy and work life in England best symbolizes the profound impact of the industrial revolution. Both these revolutions were underpinned to an extent by a belief in moral and scientific progress and the possibility for humanity to make continuous social and moral progress. This sentiment was firmly expressed by Henri Saint-Simon who stated that '[T]he Golden Age of the human race is not behind us but before us; it lies in the perfection of the social order' (quoted in Bilton et al.: 1996: 37). This perhaps overly optimistic view of the possibilities for making social and moral progress was not only characteristic of science and politics at the time, but also of liberal thinking.

As we will see in chapter two, the liberal thinker John Stuart Mill was also optimistic about the possibility of humanity's making social and moral progress. An important point related to the central concern of this thesis is that underlying this notion of progress was the presupposition that all human beings shared the same notion of reason and rationality. By addressing this shared notion of reason and rationality through enlightenment and education, more and more people would come to share the progressive ideas inherent in, for example, the ideals of the French revolution: liberty, equality and fraternity. A shared ability to reason and rationality was thought bound to lead to convergence on the truths of such liberal ideals. Arguably, the industrial revolution gave not only progress, but also created a range of new social arenas and social problems related to urbanisation and the development of a distinct class society, where the working class faced a grim and often uncertain social reality. These problems gave rise to a concern for social justice, which has since been an important element of liberal thinking (this issue will be discussed in more detail in the next chapter). Important in this context, both the notion of progress and a universalizable notion of reason found expression within liberal constitutionalism, and

traces of these aspects of the theory are still present within this perspective, although, these elements have proved to be controversial among contemporary political philosophers.

What has been said so far about the transforming powers of the Reformation and the Enlightenment is well-established. In a sense, this is simply a brief description of the development of modernity. Important constitutive features of modernity are the development of the nation state, the diminishing force of religion and tradition, the growth of rationality, continued urbanisation, industrialisation and scientific and material progress (Bilton et al.: 1996). The interesting feature of liberal constitutionalism is that it has been present through the entire period in which modernity has developed and transformed social and political life. It thus embodies and symbolizes many of the distinctive features of modern life. Furthermore, it has been a significant political and philosophical force in modern life and has influenced constitution writing and the development of liberal democracies around the Western world. Thus, given the influence and importance of liberal constitutionalism historically, and how closely the liberal constitutionalist project is tied to modernity, it is a question of great significance if this model now crumbles under the criticisms and challenges recently levelled against it.

From this brief outline of the historical context surrounding the development of liberal constitutionalism, we can appreciate some of the central ideals of this approach. These can briefly be summarised as centring around the rights of the individual versus the state and other individuals, *pace* the quote from Hobbes above regarding the importance of the limits of the state and the political obligations of the subjects in a commonwealth. A second concern we saw in the quote from Locke was the importance of democracy and its foundation in equality and liberty. A third ideal derivable from the ideals of equality and liberty is the idea of a universal notion of reason and rationality. The belief is that all human beings of sound mind have more or less similar capacities to reason and be swayed by reason. So, it is clear that also elements of the Enlightenment are influential in shaping liberal constitutionalism. In addition, in recent times the side effects of industrialization and capitalism with the development of class societies where the different classes enjoy highly different life chances and prospects for material prosperity have given rise to a concern for social justice and for the distribution of material resources in society. So, what defines liberal constitutionalism today is a commitment to the ideals of liberty, equality, the proper

limits of legitimate government, democracy and distributive justice. Politically, the ambitions of liberal constitutionalism are to realize these ideals to establish a society of members of equal moral standing.

In contemporary political philosophy, these aims form the foundation of liberal constitutionalism and the ambitions above have been developed in great detail. In the contemporary debate, these ideals have first-and-foremost been associated with the political philosophy of John Rawls, and it is perhaps partly due to the enormous influence his theory has enjoyed that liberalism has been the dominate approach to political philosophy during recent decades. Despite its recent flourishing, its credentials have increasingly been questioned and challenged. In particular, the idea of a universal notion of reason and rationality as expressed by the Enlightenment thinkers has proven to be controversial among contemporary critics of liberal constitutionalism. This notion has been difficult to maintain in modern democratic societies marked by strong moral and political disagreements. A second issue of dispute is what kind of model of democracy underlies liberal constitutionalism. More specifically, liberal constitutionalism has been criticized for embodying a simplistic understanding of democracy, because it has not acknowledged the importance of accepting the outcomes of the deliberations of the electorate. A third criticism argues that liberal constitutionalism is unable to deal adequately with questions of social justice and multiculturalism.

Related to all these three issues is the problem of combining pre-political principles of justice with a similar strong commitment to democracy. The two first criticisms touch directly upon the apparent difficulty of combining justice and democracy within the same framework by focusing on how a workable and legitimate model of democracy where the demos is sovereign can be squared with the commitment to substantive moral rights outside the reach of ordinary politics. The third question is related to the central puzzle in this thesis in that it focuses on the scope of liberal constitutionalist justice. It asks what liberal constitutionalist justice requires and what its implications are for social justice and the many controversial issues concerning multiculturalism such as group specific rights and dealing with an increasingly diverse and pluralistic modern society. Central to the criticisms is the controversial character of the Enlightenment legacy. Many critics of liberal constitutionalism have suggested that liberal constitutionalist theory ought to emphasize more its historical and intellectual links with the Reformation rather than

the Enlightenment especially to overcome the challenges posed by multiculturalism. From the discussion in this section we see that liberal constitutionalism faces considerable challenges related both to the role of justice and democracy in their theories, and the role of social justice, and the broad range of issues associated with multiculturalism. In the next section, I will discuss these issues in more detail to see how these criticisms affect the liberal constitutionalist project.

## **2. Three Challenges for Liberal Constitutionalism**

For liberal constitutionalism to present a plausible political theory the challenges briefly set out above must be answered, or at least the model of liberal constitutionalism must be more plausible than other competing political theories. Because of the important historical and political role liberal constitutionalism has played in the development of Western democracies a failure of liberal constitutionalism to offer a plausible political theory points towards a dramatic shift in political theory and possibly in politics too (in the longer term). In this section, I introduce in more detail the challenges that will occupy me for the most part in this thesis. The first challenge concerns how reason is understood in liberal constitutionalism, and contrasts the different understandings of reason expressed in Reformation and Enlightenment liberalism. The second challenge is over the kind of model of democracy to which liberal constitutionalism is committed. This issue is discussed with reference to two of the dominating approaches to democratic theory: pluralism and deliberative democracy. The third challenge to liberal constitutionalism is over the role of substantive rights in democracy. The list is of course not exhaustive regarding the challenges to liberal constitutionalism, but is indicative of the main concerns of liberal constitutionalism and democracy.

The first challenge is the understanding of reason in liberal constitutionalism. The criticism is that modern societies, instead of converging on a body of truths around which there is consensus, are instead marked by an increasing moral and political pluralism and diversity. Being committed to a universal ideal of reason that has it that our shared rationality and ability to reason will lead to moral convergence - as the inheritance from the Enlightenment presupposes - seems simply to contradict the political realities of modern societies. Modern societies are not marked by a convergence on moral and political questions; rather they are marked by an ever-increasing disagreement and moral pluralism. This criticism is relevant to democracy

in two ways. First, if there is an ever increasing body of truths that everyone will endorse, this means that the role of democratic decision-making is downplayed. If reason and science can offer correct answers to a wide range of political questions, the need for democracy seems weakened. Secondly, the belief in a universal notion of reason, helps to justify the crucial set of civil and political rights. A shared notion of reason presupposes that all human beings will share some of the same basic needs and interests, such as an interest in protecting their personal and bodily integrity, being free to associate with others the way they want, freedom to express themselves as they want both privately and publicly, etc. These basic interests and needs coalesce into a set of civil and political rights seeking to protect the basic interests of all human beings. If this set of rights is not justifiable, the liberal constitutionalist approach seems doomed from the start. The challenge here is to show how a commitment to civil and political rights is compatible with diversity and pluralism.

The concept of reason itself is many-sided and can be articulated in different ways in different contexts. In this thesis, I will mainly distinguish between a weak and strong understanding of reason. A weak understanding of reason has it that the number of moral and political principles that can be universally shared by human beings is limited to merely the set of civil and political rights associated with liberal constitutionalism. This thesis will discuss theories based on even weaker understandings of reason, but when it is said that the notion of reason underpinning liberal constitutionalism is weak what is meant is that the moral and political principles it claims can be universally shared is limited to civil and political rights. A strong notion of reason has it that the number of moral and political principles universally shared is more extensive, and goes beyond a set of civil and political rights, by, for example, including many principles of social justice, group specific rights, welfare rights, and so on. Such rights may be consistent with liberal constitutionalism, but they are not strictly required by it. The view this thesis will take on the rights associated with a strong notion of reason is that they are subject to reasonable disagreement, and not subject to universal agreement. Furthermore, divergence and convergence of reason will be used to describe a weaker and stronger notion of reason (where reason is more divergent we should have less confidence in the universality of its results, whereas where there is convergence on reasons, we might expect more extensive agreement).



The second challenge is to say what kind of democratic model liberal constitutionalism is committed to. For example, for liberal constitutionalism a plausible model of democracy is one with a constitution setting out the workings of the political system, and assigning civil and political rights to its citizens. In addition, the state ought to be impartial between competing conceptions of the good and not favour particular conceptions of the good over others. So far, this seems good, at least from a liberal perspective, but a challenge is that from the perspective of the two dominant contemporary democratic theories this view does not go down that well. Robert A. Dahl's pluralistic theory (1956 and 1989), which gained enormous influence between the fifties and the seventies, would find it hard to accept a constitution with a set of fundamental rights that go beyond what is necessary for a working democratic order. The reason is that such rights violate the democratic authority of the people by being outside the reach of the democratic process. Such a set of substantive moral rights beyond democratic control denigrates the idea of popular sovereignty and fails to take democracy seriously.

From the perspective of another influential democratic theory, deliberative democracy, which gained influence during the nineties and onwards, the liberal constitutionalist approach to democracy is not satisfactory either. A troubling aspect with liberal constitutionalism for many deliberative democrats is the lack of attention it pays to deliberative procedures seeking to include and enhance wide participation among the electorate. Encouraging such participation is vital in establishing the legitimacy of democracy and in ensuring that the people is fully sovereign. For many deliberative democrats it is necessary to go beyond the mainly procedural model found in liberal constitutionalist understandings of democracy and to include a range of deliberative practices. The liberal constitutionalist model of democracy does not encourage wide participation, which, it is argued, is vital in building a legitimate political order.

Now, the dilemma for liberal constitutionalists is that excluding a set of civil rights from the constitution would go against their deeply felt commitment to values such as equality and liberty. Little would be left of their commitment to justice if liberal rights were taken out of the constitution. So, for pluralists, liberal constitutionalism is too strong in the sense that it includes too many substantive elements in its model of democracy. For deliberative democrats, it is the opposite problem. Deliberative democrats would think that the liberal constitutionalist model of

democracy is not strong enough and ought to include more deliberation and perhaps even be more centred around consensus in order to gain legitimacy. What deliberative democrats would ask for would be a stronger notion of democracy, not a weaker one.

We see from the criticisms by the pluralists and the deliberative theorists that liberal constitutionalism is out of tune with both the two dominant approaches to democratic theory in the contemporary discourse. This reinforces the impression that liberal constitutionalism faces difficulties in incorporating a plausible understanding of democracy. It also shows that there is an important division in contemporary democratic theory over how to conceptualize a legitimate democratic order. Liberal constitutionalism can of course try to escape the dilemma by arguing that both the pluralistic and the deliberative understanding of democracy are wrong, and instead advance a distinct liberal alternative. This is a plausible reply, but if it is to work, it is necessary to address the underlying tension that is reinforced by the criticisms from pluralists and deliberative democrats. The criticisms can be said to exemplify some of the difficulties liberal constitutionalism is facing in trying to combine the ideal of popular sovereignty with the moral ideals of equality and liberty. For pluralism, which emphasizes the authority of the people and the value pluralism present in a democratic society, the liberal constitutional approach is clearly too strong because of its commitment to the ideals of equality and liberty. For deliberative democracy, the model is not strong enough as it does not emphasize deliberation, the sovereignty of the people and is not consensus-oriented enough. To satisfy the pluralist concern would be to give up on the ideals of justice, and to satisfy the deliberative concern would be to reject the acknowledgement of the importance of pluralism emphasized by the pluralist tradition in democratic theory. Thus, we see that in giving concessions to its critics, liberal constitutionalists are forced to give up some of their central tenets, and risk losing the distinctive character of their approach to political theory.

Finally, concerning the third challenge similar problems arise over the issues of substantive rights versus procedural rights and the issues of social justice and multiculturalism. The challenge concerning substantive and procedural rights was briefly touched upon above and has been one of the longstanding issues in democratic theory versus liberal constitutionalism. This issue is perhaps where the dilemma is most striking and seen in its most direct form. Many democratic theorists claim that including a set of civil rights in the constitution that is to be outside the reach of the democratic process is flatly anti-democratic and shows that liberal constitutionalists do

not take their commitment to democracy seriously (Dahl: 1989 and Dryzek: 2000). At the same time egalitarians and proponents of multiculturalism claim that liberal constitutionalists are not taking their commitment to justice seriously enough because the constitution does not include principles of social justice such as a strong defence of equal opportunity, universal basic income, or specific rights to groups of various kinds. Again, liberal constitutionalists are attacked from two fronts and fall between two stools and appear unable to respond to the competing demands from justice and democracy. Resolving this dilemma will be problematic as long as liberal constitutionalism remains equally committed to justice and democracy

In summary, liberal constitutionalism's commitment to justice and democracy has three facets each of which is problematic. First, the way in which liberal constitutionalism conceives of reason is problematic. Secondly, liberal constitutionalism's model of democracy is problematic. Thirdly, liberal constitutionalism's understanding of the role of civil rights is problematic. From this brief discussion, we see that for liberal constitutionalism to be taken seriously and for it to be able to provide a plausible political theory, it is necessary to resolve these tensions; or at least present a liberal constitutionalist theory that is more plausible than its closest competitors. How liberal constitutionalism can respond to these problems constitutes the main focus of this thesis and the next section sets out a brief overview of how I will go about discussing these problems.

### **3. Overview of the Thesis**

My ambition in this thesis is not decisively to resolve the considerable challenges in combining principles of justice with a commitment to democracy. Instead, my ambitions are more modest, and my prime concern is to point out what seems to me to be a plausible political model of liberal constitutionalism given the starting point of commitments to both justice and democracy.

If equally important commitments to justice and democracy were not demanding enough, liberal constitutionalism is also committed to additional premises: the principle of liberal legitimacy and the fact of moral and political pluralism and diversity. The first refers roughly to the idea that a political order must be justifiable to all those individuals who are living under it. This echoes the concern above raised by Locke about human beings' fundamental equality and liberty and that no one can coerce another to obey a political order to which they have not consented. Pluralism

and diversity refers to the fact that modern societies are increasingly diverse and contain a wide variety of religions, faiths and systems of beliefs. Acknowledging this fact shows that liberal constitutionalism is sensitive to pluralism and diversity, but this fact also raises challenges in terms of how these different conceptions of the good can peacefully coexist together. For example, a controversial issue regarding pluralism and diversity has recently been over the claims made by many groups demanding group specific rights to protect their cultural and religious identity. For liberal constitutionalism, these two additional conditions make the challenge of combining justice and democracy even harder. Arriving at a political model justifiable to everyone living under it is difficult enough when trying to combine justice and democracy, but adding the additional requirement of doing this under conditions of wide moral and political disagreement makes the task even harder. On the face of it, this challenge seems impossible to meet and the liberal constitutionalist project appears quixotic in trying to achieve a just political order under such demanding conditions. However, this is the task liberal constitutionalists have set themselves, and the first chapter outlines these conditions in more detail and discusses them in relation to both justice and democracy.

Although many liberals are happy enough to accept the challenge in this way, they differ greatly in their answers as to how these challenges can be met. Although most liberals accept the idea of liberal legitimacy and reasonable pluralism, two main approaches can be identified: either they emphasize the intellectual heritage from the Reformation, or they emphasize the heritage from the Enlightenment. The Reformation based approach I argue is too weak to establish a truly liberal constitutionalist framework as it is not able to guarantee fundamental equality and liberty. In trying to accommodate increasing diversity in modern society by weakening the liberal ideals of equality and liberty, it gives too many concessions to those who reject the ideals of fundamental equality and liberty. Thus, this approach fails to realize a liberal constitutionalist account of justice.

Conversely, Enlightenment liberalism ends up with too narrow a conception of reason and puts too many limits on the ability of democracy to arbitrate between different and divergent conceptions of the good. Especially when it comes to how to understand equality and liberty, it offers definitions that are narrow and that exclude a wide range of possible interpretations. This means that the terms ‘reasonableness’ and ‘reasons’ exclude many otherwise reasonable conceptions of the good. Enlightenment

liberalism brings to the table a rigid understanding of what reasonableness and reason entail. This rigid notion is unable to uphold the liberal constitutionalist commitment to democracy. Thus, we see that the two main approaches fail in delivering a political model that can accommodate both justice and democracy. Reformation liberalism fails in realizing liberal constitutionalist principles of justice; Enlightenment liberalism fails in fulfilling its commitments to democracy. Hence, the second chapter concludes that a third alternative is required to combine the different competing demands in a more plausible way.

A third alternative needs to incorporate both the commitment to fundamental rights of equality and liberty, and the commitment to democracy. Thus, a third alternative must embody both the perspectives of Reformation liberalism and Enlightenment liberalism. Crucially, this third alternative must employ a balanced notion of reason, not too strong or too weak, and it must acknowledge both the ideal of liberal legitimacy and pluralism. A theory that seems to meet this description - justice as impartiality - is discussed in chapter three. This theory seeks to combine the ideals of equality and liberty with a strong commitment to democracy; it acknowledges the principle of liberal legitimacy and is sensitive to the pluralistic character of modern societies. The theory sets out to combine these characteristics by relying on impartiality as a way to balance all these competing claims. Thus, this alternative appears to be an attractive model for a liberal constitutionalist order. However, when the theory is connected with its alleged political implications it seems to run into trouble, as at the end of the day, it seems that justice as impartiality is merely a version of Enlightenment liberalism and will encounter exactly the same problems as outlined above. At this point, several alternatives have been considered to see whether they can satisfactorily combine justice and democracy and simultaneously meet the requirements of liberal legitimacy and pluralism. However, none seems to live up to the expectations. The quest to find a theory suitable for a liberal constitutionalist political order appears to have failed.

However, all hope is not abandoned yet. Justice as impartiality can be interpreted in a weaker and more plausible way that might serve as a starting point for approaching a liberal constitutionalist order in a slightly different way. Following this thought, chapter four analyses the role of reason in justice as impartiality and sets out a weaker notion of reason than the one deployed in the previous chapter. Furthermore, I argue that there is a crucial distinction between what justice requires and what is

consistent with justice. The significance of this distinction is that even a strict Enlightenment notion of reasons and reasonableness can be consistent with justice under certain circumstances, but not required by justice under all possible circumstances. Thus, through democratic processes a society may choose to enact relatively strict limitations on, for example, group rights or to realize a strong notion of equal opportunity. These schemes may go beyond what justice requires, but nevertheless be consistent with justice, as they do not necessarily violate either someone's rights or the democratic process. By including this (commonsense) distinction, it is possible to meet some of the commitments to both justice and democracy without sacrificing one on behalf of the other. Such an interpretation has been called plausible but not persuasive, as it is unable to accommodate consequentialist intuitions when such intuitions appear plausible. Through a discussion of how this model is sensitive to consequentialist justifications of democracy, I reject this objection and point out how this theory is able to accommodate consequentialist intuitions when they are plausible and reject them when implausible. Thus, after supplementing the theory with some additional steps it seems that we have arrived at a point where we have a theory that might have the potential to realize the aims of liberal constitutionalism.

Through the discussion in chapters 1-4 this thesis seeks to arrive at a plausible notion of reason. Allocating so much attention to the role of reason is important because the account of reason will inform the answers to the questions of democracy and the role of rights. My interpretation of justice as impartiality aims to establish a third alternative that is not too weak (Reformation liberalism) or too strong (Enlightenment liberalism). Although justice as impartiality has been understood as relying on a relatively strong notion of reason the interpretation in this thesis emphasizes the weaker elements as its core. Thus, when this issue is settled, the two next tasks are to analyse what kind of model of democracy follows from liberal constitutionalism and how substantive civil rights can be squared with democracy. These two questions are pursued in chapters five and six.

To start with the issue of a model of democracy, there are broadly speaking two main alternatives in contemporary democratic theory. One is to think of democracy as a realization of citizens' preferences and the majority principle as foundational, and where the citizens' role restricted to being voters in elections (pluralism). The other is as a process where there is an aim to encourage as wide

participation as possible and to employ a wide range of deliberative practices in ensuring impartiality and participation (deliberation). The problem with the first model is that it does not offer sufficiently protection to equality and liberty, and does not emphasize impartiality to the extent that liberal constitutionalism requires. The second, deliberative, model emphasizes impartial concerns through its focus on deliberative practices, but at the same time often deploys a thick notion of the common good that seems to be difficult to square with the pluralistic character of modern societies, as it is based on a relatively narrow conception of the nature of reason. To find a plausible liberal constitutionalist model of democracy it is necessary to reject both these models in their pure forms, and instead borrow elements from both to construct a model satisfying liberal constitutionalist concerns. Briefly stated chapter five holds that, what seems to suit liberal constitutionalism is to base democracy on deliberative procedures, but to leave out a strong conception of the common good and reason, and instead endorse the idea present in the pluralist model that the democratic system in itself represents a common good, and the strongest common good that is acceptable given pluralism.

With this model of democracy in hand, what remains is to find the proper scope for justice within it. A particularly longstanding controversy in democratic theory is the extent to which principles of justice can legitimately be squared with democratic sovereignty, and this controversy forms an important background for the issues discussed in this thesis and is one which it is crucially important to resolve. I argue that those who are sceptical about introducing substantive moral rights constraining the democratic process ought to be less sceptical for two main reasons. The first is that procedural democratic rights and the more substantive liberal principles of justice share some of the same underlying thinking. The justification of both procedural democratic rights and substantive civil rights and principles of justice is essentially based on the same appeal to justice (equality and liberty). Secondly, there is an analogy between deliberative democracy and the contractualist thinking which underpins justice as impartiality in that both models seek to avoid the biases and partiality which can taint the democratic process. Thus, those who are persuaded of the virtues of deliberative democracy ought to be less suspicious of the substantive rights that follow from the contractual framework in justice as impartiality. Chapter six, therefore concludes that the controversy over substantive moral rights is overstated by some critics, and that the procedural and substantive conceptions of

democracy are closer to each other than is often assumed by some democratic theorists.

Now with a model of democracy and an answer to the issue of substantive rights, that does not mean that these obstacles are cleared away. What it means is that liberal constitutionalism looks more plausible than its critics claim. Furthermore, it is possible to get a clearer picture of what a political model of liberal constitutionalism looks like and of its implications. Briefly outlined, the liberal constitutionalist model emphasizes a strong version of political equality to ensure that the democratic process is legitimate. Part of this concern includes deliberative processes to encourage wide participation. In addition, the constitution is supposed to include civil rights such as freedom of religion, the integrity of the person, rule of law, etc. Liberal constitutionalism is therefore a theory with strong procedural implications for how the democratic process is carried out. This concern is combined with a firm protection of individual rights to ensure that the democratic process does not violate the interests of the individual or of vulnerable minority groups. When it comes to issues of social justice such as equal opportunity, the model says that justice does not require a strong notion of equal opportunity, but also holds that such a notion of equal opportunity is consistent with liberal constitutionalism. It should already be stressed that this thesis does not aim to offer a full treatment of social justice in relation to democracy and liberal constitutionalism, but aims instead to discuss this case as an example of the political implications of the liberal constitutionalist position. The same applies to the issue of group rights. On this issue the liberal constitutional model says that group rights are acceptable as long as they do not interfere with the fundamental political and civil rights that form the backbone of liberal justice. I argue that this model yields plausible answers and - given the starting point of a problematic joint concern for both justice and democracy combined with liberal legitimacy and pluralism - a model along the lines outlined in this thesis seems inevitable. A weaker model would violate the commitment to justice and a stronger model would violate the commitment to democracy. In chapter seven I argue that the balance seems to be along the lines outlined in this thesis.

So, this is where the quest for an answer to the puzzling commitment to both justice and democracy found in liberal constitutionalism takes us. These two commitments can be combined, although it requires a fine balancing act to get it right. In the conclusion, I briefly summarize the main arguments of this thesis and attempt to



describe the political implications in more detail. These final reflections end with some remarks about the relationship between politics and philosophy, which is an important underlying issue in the quest for justice and democracy.

#### **4. Concluding Remarks**

How can liberal constitutionalism combine an equally strong commitment to both principles of justice and principles of democracy without running into trouble? That is the central question to be answered in this thesis and from the brief outline here we see there are three main challenges involved in combining these commitments. The first challenge is over the role of reason; the second over what model of democracy liberal constitutionalism can endorse; the third over how substantive rights can be combined with democracy. These challenges arise from the defining feature of liberal constitutionalism of being equally committed to justice and democracy. This double commitment is also present in the historical roots of liberalism, and today many theorists distinguish between Reformation and Enlightenment liberalism. These two forms of liberalism will be extensively discussed in chapter two. Before embarking on that task the next chapter will elaborate two of the strongest constraints on liberal constitutionalism, which are the principle of liberal legitimacy and the demands that arise from the fact of pluralism. By introducing these two additional conditions liberal constitutionalists make it harder for themselves to create a plausible political order based on justice and democracy. However, the two additional constraints are nevertheless plausible, and follow neatly from the main concerns of liberal constitutionalism: moral equality, the liberty of the individual, and the need for consent. Analysing these additional constraints and how they are influenced by the concern for both social justice and for democracy aims to show the significance of the dilemma facing liberal constitutionalism in combining justice and democracy.

## CHAPTER ONE

### The Context of Liberal Constitutionalism

*A general law – which bears the name of Justice – has been made and sanctioned, not only by a majority of this or that people, but by a majority of mankind. The rights of every people are consequently confined within the limits of what is just.*

Alexis de Tocqueville<sup>2</sup>

Tocqueville captured an important idea of the liberal constitutional notion of justice when he pointed out that justice goes beyond this or that majority, and in fact rests on an appeal to mankind. His idea has long informed the liberal tradition and remains influential. One aim of this chapter is precisely to describe how this idea is carried through in contemporary liberalism. I argue that in contemporary liberalism this appeal is informed by two crucial background factors. The first is how the increasing level of diversity and pluralism in modern societies profoundly affects politics and political theory. Secondly, liberals seek to anchor justice in a political order that can be justified to everyone living under it. This is often referred to as the liberal principle of legitimacy. Although both conditions are widely acknowledged by liberals, combining them, we will see, sharpens the dilemma of how justice and democracy can be combined. The idea of liberal legitimacy is an extremely demanding condition (although perhaps a highly plausible one). It points out clearly the high ambitions of contemporary theories of liberalism. However, the emphasis on diversity and pluralism makes it increasingly difficult to satisfy this condition both politically and philosophically. Attempts to satisfy these two background conditions are often criticized for either being unrealistic and too demanding to be implemented in practical politics, or as insensitive to how increasing diversity may be accommodated within a liberal framework. For example, both Jürgen Habermas and John Rawls are often criticized for being utopian and unrealistic (Gaus: 2003). Likewise, the liberalism of Brian Barry can also be said to be engaged in this project, but has often been criticized for being insensitive to the demandingness of these two conditions (Tully: 2002, Mendus: 2002 and Parekh: 2002). Despite their plausibility, as a

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<sup>2</sup> *Democracy in America*, p. 301

foundation for political theorizing they pose great challenges that seem difficult for contemporary political theory to overcome.

A second purpose of this chapter is to examine how these two conditions inform theories of liberalism. My discussion focuses specifically on the implications of these two conditions for social justice and for the role of democracy in liberal constitutionalist thought. Liberal constitutionalists' commitment to justice not only includes a commitment to fundamental civil and political rights, but many liberal constitutionalists are also strongly committed to ideals of social justice. The crucial question to ask concerning social justice is: how can principles of social justice accommodate pluralism and liberal legitimacy? My discussion of this question aims to point out how the commitment to social justice is difficult to align with these two background conditions. That is in part because a strong commitment to ideals of social justice is difficult to square with pluralism, and partly because a commitment to social justice is hard to square with a commitment to democracy. The question I am asking concerning democracy is 'what does democracy require of liberal constitutionalism to accommodate pluralism and the principle of liberal legitimacy?'. Democracy under pluralism requires that a liberal constitutionalist political order takes adequate account of the high level of moral and political divergence. This sounds commonsensical and obvious, but is made complicated since there are some limits for liberal constitutionalists. The resultant political order must ensure that liberal civil and political rights are protected. Liberal constitutionalists require a convergence on this liberal minimum to satisfy the liberal commitment to justice. The challenge for liberal constitutionalists is that the two background conditions represent competing demands. Pluralism and diversity demand acceptance of the divergence of reason regarding political and moral questions, while the principle of liberal legitimacy demands convergence of reason on certain political and moral questions. Thus, combining the two background factors in a way that can satisfy the competing demands from divergence and convergence represents a real and threatening challenge for liberal constitutionalism. I will not try to offer a precise answer to how liberal legitimacy and pluralism can be satisfied in this chapter, instead I aim to elaborate and set out some of the issues that need to be addressed in order to answer the challenges identified in the Introduction.

## **1. Two Background Conditions of Liberal Justice**

Two features have especially informed much recent liberal political theory. The first one is of a mainly sociological character (although with important philosophical implications), and the second is of a mainly philosophical character. The first one holds that social life is marked by a plurality of conceptions of the good and political disagreement, for example, over moral values or the distribution of scarce resources. These disagreements often give rise to political conflicts. The second feature states that a morally legitimate political order is one that is acceptable to all those living under it. Despite the high level of disagreement and diversity, this premise has been a cornerstone of much of liberal theorizing in recent times. In this section, I outline how these features influence liberal theories of justice.

Concerning the first condition, two leading democratic theorists Amy Gutmann and Dennis Thompson have argued that ‘of the challenges that American democracy faces today, none is more formidable than the problem of moral disagreement’ (Gutmann and Thompson: 1996: 1). Moral disagreement is not only prevalent in today’s America, but in fact, most societies around the world are characterised by moral diversity and pluralism. They are societies in which people have different (and sometimes competing) conceptions of the good. I will in this work understand different conceptions of the good as the fact that modern societies include persons with a variety of religions, philosophies, traditions and cultures, which each give special weight to different concerns and interests. For example, on this account Christianity, Atheism and the culture and traditions associated with a geographical or ethnic group can constitute a conception of the good.

Importantly therefore, different conceptions of the good can be religious or secular and conceptions of the good thus come in many different versions. Furthermore, those who adhere to a certain understanding of what is good usually want to live in accordance with their conception of the good. Many also want public policy to cohere with their deeply held convictions. An example of this is how ethnic and cultural groups often argue in favour of being granted group specific rights reflecting, for example, their religious and cultural peculiarities. The questions covering such issues are wide, ranging from official acceptance and equal treatment of homosexuality to more prosaic and relatively trivial claims regarding exemptions for certain religious groups from wearing crash helmets while driving motor cycles.

During the 1990s and the 2000s many of the important conflicts of this kind have been discussed under the banner of multiculturalism. The questions covered by this label occupy a vast number of issues, and because of this, the term 'multiculturalism' itself often defies a clear and unitary definition. Some of these issues consider claims from marginalized groups including ethnic, religious, sexual and demographic minorities. In addition, an important condition informing this debate is the underlying premise that modern societies are bound to deal with the diversity arising from culture and religion and offer political theories able to analyse adequately modern political life. In the words of one of the most active participants in this debate:

Modern societies are said to be characterized by deep diversity and cultural pluralism. In the past, this diversity was ignored or stifled by models of the 'normal' citizen, which were typically based on the attributes of the able-bodied, heterosexual white male. Anyone who deviated from this model of normalcy was subject to exclusion, marginalization, silencing, or assimilation... Today, however, previously excluded groups are no longer willing to be silenced or marginalized, or to be defined as 'deviant' simply because they differ in race, culture, gender, ability or sexual orientation from the so-called 'normal' citizen. They demand a more inclusive conception of citizenship which recognizes (rather than stigmatizes) their identities, and which accommodates (rather than excludes) their differences.

(Kymlicka: 2002: 327)

Despite the legitimate concerns outlined in this passage, the status of such claims has been tremendously difficult to settle both politically and philosophically. Politically, partly because of resistance from majority populations who are unwilling to make any concessions to the groups mentioned above. Philosophically there are serious difficulties in translating claims based on culture and group identity into claims about rights and political demands. Many of the claims are based on groups and cultures as constituting a certain identity. However, the exact content of the terms 'groups' and 'culture' are fluid and escape an exact definition, and the problems associated with drawing clear distinctions between groups and cultures complicates any political process of awarding rights to groups based on ethnic and cultural identity (Kukathas: 1997: 415-416). Although the debate has contributed to an increased awareness of marginalized minorities both in politics and political philosophy, it has given few determinate results.

In addition, the world provides human life with a scarcity of resources, and conflicts easily arise from competing claims over the use and allocation of such scarce resources. Scarcity of resources is often referred to as ‘moderate scarcity,’ which is commonly understood to mean that the scarcity is within the upper and lower bounds of nature (Hume: 1777: 183-189 and Rawls: 1999a: 109-112). This means that the scarcity is not extreme; abundance of resources would not give rise to questions over their distribution, and the complete lack of resources will not give rise to any disputes over their distribution either, as there is nothing to distribute. In contrast to these two extremes, the dominant view is that resources are available in moderate amounts.<sup>3</sup>

The important point here is not that scarcity and disagreements arising from different conceptions of the good automatically and always lead to a social order of constant and open conflict. Instead, the important point is the Hobbesian observation that conflict ‘consisteth not in battle only, or the act of fighting; but in tract of time, wherein the will to contend by battle is sufficiently known’ (Hobbes: 1651: 84). The diversity of different conceptions of the good within most modern societies means that politics is partly shaped by the awareness of potential political conflicts. Of course, this does not mean that modern political life is in a constant ‘state of nature.’ Instead, it means that the awareness of differently thinking co-citizens informs the political order, and that those who adhere to a different set of values than oneself are willing - under certain circumstances - to advance their own interests against competing conceptions of the good.

Taken together, disagreements over values and scarce resources seem to be two important sources of conflicts of justice in contemporary societies. Either questions of justice arise over how to reconcile disagreement based on conflicts between different conceptions of the good, or over the distribution of scarce resources. An example of disagreement between different conceptions of the good concerns how they weigh values differently. This is especially evident in disagreements between religions or different cultural groups. Conflicts in such cases are often over the ordering and significance of different values. An example is how proponents and adversaries of group specific rights weigh the importance of cultural identity and the

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<sup>3</sup> The conditions defined by Hume are usually referred to as the necessary and sufficient background conditions of justice, as in Rawls (1999: 109-112). This view has been challenged by Barry (1989) and more recently Vanderschraaf (2006). However, for the present purpose the point is not to engage in a discussion of the necessary and sufficient background conditions of justice but mainly to point out how scarcity is an important source of political disagreement.

importance of group autonomy differently. In disputes over resources, the central issue is not so often related to the importance of values, but how resources ought to be distributed between different groups who claim a legitimate stake in these resources. In capitalistic market economies, conflicts typically arise between owners of capital and labour over how to distribute the surplus from social cooperation. In the contemporary debate the former set of issues is often discussed under the label of multiculturalism, while the latter set of issues under the label of social justice. Both issues will form part of the discussion in this thesis. In either case an important point to notice is that questions of justice often invoke deeply held values or the livelihood of people, therefore disagreements over justice have the potential to end in deep and irreconcilable conflicts between different factions of society.

An important task for political theory is to find ways to resolve disagreements over these issues. Theories of liberal justice suggest ways in which this might be done and one of the main concerns of a theory of justice is how different conceptions of the good can be reconciled and peaceful coexistence secured. This concern can be formulated in the following way:

In its most general form it is simply that a society in which people accept no guide to conduct except their own conception of the good (in the broad sense now defined) is one doomed to mutual frustration and conflict. For if nobody recognizes any court of appeal with authority superior to that of his own conception of the good, there is no basis on which conflicts stemming from diverse conceptions of the good can be resolved.

(Barry: 1995: 30)

Simply put, society is made up of conflicting conceptions of the good, and what justice demands is a set of principles acceptable to all, which can be used to resolve disagreements. Crucially, a liberal constitutional order must be based on ‘authority superior to that of’ particular conceptions of the good, otherwise there is a risk that might makes right. An order where might makes right is problematic from a liberal perspective because such an order easily violates the foundational ideal of equality underpinning liberal constitutionalism.

People have an interest in resolving such deep disagreements, but it matters to them how these disagreements are resolved. It is important that they feel the political order they have to obey is one that is acceptable and morally justifiable to them. An

important aspect of contemporary political philosophy is to define such a political order. The significance of this point needs to be emphasized. For most members of a society, their lives will go better if not interrupted by social strife and conflict, so the interest and motivation to avoid social conflict is strong. Furthermore, if conflicts and disagreements over deeply held convictions and strong interests can be resolved in ways that are morally justifiable to all members of society this serves as a potentially fruitful political order. In different forms, this issue has preoccupied political philosophers at least since the seventeenth century, and some of the most influential solutions have been cast in terms of a social contract (Hobbes, Locke and Rousseau). The essence of this contract view 'is that each of the contracting parties voluntarily accepts constraints on the pursuit of his own ends. And that is precisely what we are looking for: a mutually acceptable basis for restraint in the pursuit of one's conception of the good' (Barry: 1995: 31). A just political order would then be based on constraints acceptable to everyone. Effectively a political order acceptable to everyone is a public justification of the governing principles of the political order. Despite its public character, this contract relies on hypothetical consent and not actual consent, and is based on the good reasons someone would have in favour of accepting or rejecting a political order.

Resolving disagreements by appeal to constraints acceptable to everyone informs many liberal attempts to define a legitimate political order. For example, these concerns were important motivations for John Rawls' re-formulations of his theory of justice (1996: xxxvii-lxii). The same concerns have also motivated some liberal theorists to argue in favour of the importance of sensitivity to marginalised ethnic, cultural and religious minorities (Kymlicka: 1989 and 1995). So important is this concern for legitimacy and public justification that it has been called the 'moral lodestar of liberalism' (Macedo: 1990: 78). The essence of how liberalism accommodates these two conditions is through a political order framed around impartiality between competing conceptions of the good. This is an attractive solution to the problems of diversity and aims to create a political order which is justifiable to everyone. However, the problem as we will see towards the end of this chapter and in later chapters, is that this commitment to impartiality poses serious questions with regard to its implications and to how it ought to be conceptualised.

A possible solution to conflicts of interest is one which is to the mutual advantage of all the involved parties. An important feature of such a conception of



justice is that people with conflicting interests agree to restrain their behaviour in ways advantageous to all the involved parties; hence, mutual advantage. Often the outcomes of such mutually advantageous agreements reflect the parties' 'relative bargaining power' (Barry: 1995: 40). The problem with this is that agreements based on justice as mutual advantage 'are no more than truces. As soon as one side or the other feels it can improve its position, there is nothing to restrain it as long as (measured within its own conception of the good) the prospective gains outweigh the anticipated costs' (Barry: 1995: 39). This latter feature creates a serious problem for justice as mutual advantage. Justice as mutual advantage is inherently unstable, as the outcomes will change with the relative bargaining power of the parties. If one party sees an opportunity to advance their case, there are no constraints to limit them, and effectively might make right. Negotiations between unions and management might serve as an example to illustrate how the relative power of the two groups is likely to reflect the outcome of the negotiations. If the management has a strong relative bargaining power against their counterparts this advantage can be utilized to achieve an outcome serving their interests better than that of the unions. Thus, the outcome does not reflect what would be the wage distribution given equal bargaining power, but rather one that reflects the interests of the management more than anything else. As long as an agreement is based on relative bargaining power, the weak party is bound to accept the share offered by those with stronger bargaining power since there is no equality between the parties.

The only requirement for reaching an agreement in mutual advantage is that the weak party is better off with an agreement than when there is no agreement. In the extreme, weak parties may be forced to accept a political order they would not have accepted under a situation with equal bargaining power between the contracting parties. Accepting such an order might still be better than no agreement for the weak party. One might think that even if the relative bargaining power of the parties is reflected in the outcome, the weak party nevertheless accepts the agreement, and accepting the agreement is tantamount to finding the agreement justifiable. However, this is not the case. The weak party accepts the agreement only because they cannot do better and are afforded no protection in justice as mutual advantage. They do not need to think the agreement is just. Thus, justice as mutual advantage does not fit well with the ideal of restraints acceptable to everyone. Because justice as mutual advantage violates the liberal intuition about justifiability to everyone, it serves as an

unsatisfactory solution to questions of justice. In response to justice as mutual advantage, theories in the social contract tradition (Locke, Rousseau and Rawls) suggests a different way to conceptualize justice.

The general premise which these social contract theories rely on is that ‘what we have to find is some course of conduct that can be accepted by all parties’ (Barry: 1989: 283). For justice as mutual advantage it is difficult to satisfy this premise because weak bargaining power may force a party to accept an agreement the party would not have accepted under circumstances of equality. Instead, principles acceptable to all ‘must have a certain quality of impartiality...the reasons for deciding should be general, publicly statable, and publicly defensible. It is the claim that the decision can be defended in ways that can in principle be equally acceptable to everyone that gives us the link between morality and impartiality’ (Barry: 1989: 290). A legitimate liberal political order is not only acceptable to all the parties, because it offers all involved parties some advantages (however marginal they may be), but is also instead one that strives to be justifiable even to those who stand to be worst affected by it.

So, morally justifiable principles comply with impartiality and public justification while non-justifiable principles violate impartiality. Combining impartiality, public justification and scarce resources leads us to the following definition of justice:

the subject of justice is the distribution of rights and privileges, powers and opportunities, and the command over material resources. Taking the term “resources” in a suitably broad sense, we can put this succinctly by saying that justice is concerned with the distribution of scarce resources – resources about whose distribution a potential for conflict of interest arises. And if we ask what we are saying about an action or an institution when we say it is unjust, the general answer is, I suggest, this. We are claiming that it cannot be defended publicly – that the principles of distribution it instantiates could reasonably be rejected by those who do badly under it.

(Barry: 1989: 292)

This aims to tell us what justice is, and underlines the importance of the liberal ideal of legitimacy.

Through this brief discussion we have arrived at an idea of the foundation of liberal theories of justice, which acknowledges both moral disagreement and

justifiability to those living under the political order. Taken together, these two premises lead to theories of justice aiming to be impartial between competing claims and conceptions of the good. However, a further question is to be answered, ‘why should we act justly?’ On this question, justice as impartiality provides two possible answers. The first answer is that we should act justly because ‘of the long-term advantageousness to oneself of being just’ (Barry: 1989: 359). According to Barry this is a necessary, but not sufficient condition for acting justly. Therefore, this answer must be supplemented with the following answer: ‘the motive is the desire to act justly: the wish to conduct oneself in ways that are capable of being defended impartially’ (Barry: 1989: 363). An example is provided to show how this motivation works: ‘trade unions will be more willing to strike if they believe they have a just claim than they would be in the world of dispassionate calculation of relative bargaining advantage’ (Barry: 1989: 365). The essence of struggles for justice is not the achievement of gains in itself, but that one’s desire for justice is derived from a genuine feeling of being denied access to a resource or an opportunity one believes one should have for reasons that could be justified to others.

In this section, we have seen that the social contract tradition and liberal justice are based on two crucial premises. (1) An important aspect of politics, but not the only one, is that politics is about disagreement and social life is marked by conflicts between different conceptions of the good and over scarcity of resources. (2) A justifiable political order is one based on impartial principles and is justifiable to everyone living under it. This position constitutes the dominant liberal approach to questions of justice. Hence, the foundation of many contemporary theories of liberalism is to be found in a concern for impartiality and a legitimate political order.

For liberal constitutionalism to offer a plausible political order, it needs to be sensitive to the high level of pluralism present in modern societies. Increasing pluralism means that society is marked by an increasing divergence on moral and political issues. This fact makes it harder to reach convergence on moral and political questions, such as the principles of justice that give rise to the set of fundamental rights so dear to liberal constitutionalism. The difficulty is that the principle of liberal legitimacy requires convergence on a political order justifiable to everyone living under it. Justifiability to everyone raises the standard for what a just political order involves and pluralism shows that it is even harder to satisfy liberal legitimacy

because of the high level of disagreement in modern societies. Thus, liberal legitimacy and pluralism together sharpen the dilemma of combining justice and democracy.

## **2. Social Justice: Principles of Justice and their Implications**

So far we have seen that liberal constitutionalism is committed to justice, democracy, and pluralism and liberal legitimacy. In addition, liberal constitutionalists have committed themselves to social justice. Equal opportunity and distributive justice have been important for many liberal constitutionalist theories. These commitments flow quite naturally from the ideal of equality. However, being committed to justice, democracy, pluralism and liberal legitimacy as the underlying and foundational propositions for their theories means also that the principles of social justice must comply with these theoretical commitments. This raises questions about what liberal constitutionalism requires and about the political implications of liberal constitutionalism. On the one hand, the commitment to the ideal of equality gives strong support for social and distributive justice. Because democracy can yield unjust outcomes judged by a liberal constitutionalist standard, constraints on the democratic process are important to realize social justice. On the other hand, invoking such constraints on a democratic society raises the question of the extent to which the people in a liberal constitutionalist regime actually can be said to be sovereign and the supreme authority of law. The commitment to social justice, therefore, exemplifies the dilemma for liberal constitutionalist theory with its double commitment to justice and democracy.

Unrestricted democracy may undermine the case for social justice, while restricted democracy undermines the case for democracy. If justice requires certain principles of social justice that means that the political implications go beyond merely a constitution with civil and political rights, but also prescribe social rights, such as rights to universal basic income, rights to work and rights seeking to re-distribute wealth. Furthermore, this has two important political implications. Firstly, it means that large shares of the government's financial resources will be allocated to re-distributive schemes outside the reach of ordinary politics. This leads to a second political implication, which is that such requirements imply that the commitment to democracy is further undermined since justice requires not only civil and political rights, but also a potentially wide range of re-distributive schemes. Thus, it appears that for liberal constitutionalists the commitment to democracy comes second to the

concerns of justice. If this is correct, the initial commitment to democracy appears rather hollow and insincere. In this section, I therefore discuss the place of principles of social justice in liberal constitutionalism.

The most well-known and debated principles of liberal constitutionalist justice are undoubtedly the two principles defended by John Rawls, and they serve as a natural starting point to see the kind of principles of justice to which liberal constitutionalists are committed. Rawls' principles are formulated in the following way:

Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and  
Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

(Rawls: 2001: 42-43)

The first principle states the equal moral status of all by assigning equal status to all members of society and it also assigns equal civil and political liberties to all. The second principle sets out what distributive justice requires: equality of opportunity and the difference principle, which states that inequalities are justifiable only if they work to the advantage of the least advantaged. An important point in relation to the issue discussed in this section is that Rawls insisted repeatedly that these two principles are 'framed for a democratic society' (Rawls: 2001: 39). Furthermore, the account, 'takes the primary subject of political justice to be the basic structure of society' (Rawls: 2001: 39). Political justice here refers to how the 'main political and social institutions... fit together into one unified system of cooperation' (Rawls: 2001: 39-40). From these remarks, it is clear that justice is closely connected to the idea of democracy and that this conception of justice maintains a strong commitment to democracy.

Although, Rawls maintained a link between his theory of justice and democratic politics, he did not say much about the implications of the principles of justice for democratic politics. This is not necessarily a weakness with the theory and his philosophical project as a whole because what he set out to do was to derive the

principles of justice for a democratic society, not to investigate their institutional and political implications. Because this particular version of liberal constitutionalism professes a strong commitment to equality this approach has often been referred to as 'liberal egalitarianism.' In recent decades this liberal egalitarian approach has gained wide influence and attention. In addition, the egalitarian implications have been much discussed when other theorists have written on the implications of the broad family of principles that can be associated with this approach. With Rawls and these later developments, liberal egalitarianism has also been put under critical scrutiny and has provoked a large number of criticisms of the implications of its principles of justice.

The most common interpretation of the institutional implications of liberal egalitarianism has been that it justifies 'the post-war liberal-democratic welfare state' (Kymlicka: 2002: 88). Many interpreters thought of the works of John Rawls, Ronald Dworkin, Brian Barry (and a number of other liberal theorists) as a philosophical justification of the institutions of the welfare state that emerged in the 1950s – 70s. One commentator went as far as to describe liberal egalitarianism 'a philosophical apologia for an egalitarian brand of welfare-state capitalism' (Wolff: 1977: 195). However, Rawls himself denounces this interpretation and explicitly dissociates his theory from the idea of a welfare state. Instead, he emphasizes the idea of a property-owning democracy (Rawls: 1999a: xiv-xvi).

While the welfare state allows wide inequalities and re-distribution to those who are unable to care for themselves, the idea of a property-owning democracy goes in a different direction. The aim is 'to put all citizens in a position to manage their own affairs and to take part in social cooperation on a footing of mutual respect under appropriately equal conditions' (Rawls: 1999a: xv). This suggests that liberal egalitarianism goes beyond mere re-distribution through taxation, which plays a dominant role in the idea of a welfare state. Instead, the idea is to enable citizens to care for themselves *ex ante*, and to avoid *ex post* re-distribution. *Ex ante* endowments are more in line with both equality of opportunity and the difference principle, because initial equality would ensure both equality of opportunity and that social and economic inequalities are to the advantage of the least advantaged because the means of ownership would be widely dispersed (Rawls: 1999a: xiv-xv).

A second element related to the implications of justice deserves attention at this point. This is a central idea in liberal egalitarian thought is that natural and social inequalities are undeserved. The idea is that no one deserves to be born into poor and

socially disadvantaged families or with severe handicaps making them immobile or only able to move around with the help of expensive equipment. Following from acknowledging this point, is the idea that if these inequalities influence your life prospects – for example, and that those from socially disadvantaged families and with severe handicaps face inferior life prospects compared with those who are from well-off families and who are able bodied - then these inequalities ought to be compensated for. Achieving equality of opportunity seems to depend on the eradication of such inequalities in life prospects.

Such compensation becomes even more complicated because it is sometimes difficult to distinguish those who are disadvantaged because of genuine social and natural inequalities and those who are disadvantaged through their own choices. Famously, those who choose to spend their life as beach-bums surfing at Malibu beach instead of participating in social cooperation such as paid labour cannot require that society ought to fund their lifestyle through transfers (Rawls: 1996: 182). Instead, citizens are responsible for their choices and must bear the responsibility of their choices when they are provided with equal life-chances (Rawls: 1999a: 7 and 81-86). However, as the recent debate on these issues shows, it is difficult to find political institutions and schemes able to distinguish adequately between people's unlucky circumstances and their voluntary choices, and hence to know when to hold citizens responsible for their own circumstances. Most people would agree that those born with disabilities and handicaps are subject to unlucky circumstances and deserve some kind of compensation. However, a different and more difficult issue that has received a great deal attention in the literature is how to avoid taxation of 'hard-working citizens to subsidize indolent citizens who do not want to work' (Kymlicka: 2002: 83).

Partly as a response to the limitations of welfare state re-distribution, and the recognition of the importance of the choice-chance distinction, a number of liberal egalitarian theorists have developed a wide range of schemes that seek to meet the requirements of liberal egalitarian justice. Examples of such schemes are Dworkin's (1981a and b) complex theory of auctions, markets and insurance schemes, universal basic income (Parijs: 1997), stakeholder society (Ackerman and Alstott: 1999) and the egalitarian planner (Roemer: 1999). The important point here is not the particular details of these schemes and their different understandings of how to draw the choice-chance distinction, but that all of them aim in some way or another to meet the liberal egalitarian requirements of distributive justice.

These institutional developments have increasingly been criticised because they supposedly invoke the wrong spirit of egalitarianism. One influential critic attacking some of the liberal egalitarian attempts just mentioned (perhaps apart from Rawls) is Elisabeth S. Anderson, who argues that ‘much recent egalitarian theorizing’ is ‘too narrowly focused on the distribution of divisible, privately appropriated goods, such as income and resources, or privately enjoyed goods, such as welfare. This neglects the much broader agendas of actual egalitarian political movements’ (Anderson: 1999: 288). The conception of egalitarian justice that Anderson attacks ‘takes the fundamental injustice to be the natural inequality in the distribution of luck’, and is named “luck egalitarianism” and ‘relies on two moral premises: that people should be compensated for undeserved misfortunes and that the compensation should come only from that part of others’ good fortune that is undeserved’ (Anderson: 1999: 289-90). Although this might seem like a legitimate concern for egalitarians it leads us to ask the important question: ‘whether luck egalitarianism identifies the right standard of what *justice* requires’ (Anderson: 1999: 296, original emphasis)? Anderson criticises the focus of much recent liberal egalitarian thought as too pre-occupied with making distinctions that are increasingly difficult to relate to what justice actually requires in modern societies. The target is not equality as such, but rather the treatment of equality by “luck egalitarians.”

Against the futility of the current liberal egalitarian approaches Anderson proposes an alternative conception of equality called ‘democratic equality,’ which among other things requires ‘that everyone have effective access to enough resources to avoid being oppressed by others and to function as an equal in civil society’ (Anderson: 1999: 320). This alternative is a more robust understanding of equality that does not rely on esoteric and impractical distinctions between worthy and unworthy receivers of compensation and re-distribution. Such an understanding of equality will make sure that citizens can participate in equal terms in politics and social life, but does not seek radical re-distribution of wealth and resources. Understanding equality in this way is preferable because this view coheres more closely with our intuitions about equality as it applies to ‘human arrangements, not to the natural order’ (Anderson: 1999: 336). What is enough depends on cultural and individual circumstances and is context dependent. Furthermore, Anderson explicitly rejects the idea of *ex ante* distributions because democratic equality is mainly concerned with the ‘capabilities relevant to functioning as a human being’ (Anderson: 1999: 320). What a



human being needs is 'equality in the capability or effective freedom to achieve functionings that are part of citizenship, broadly construed' (Anderson: 1999: 321). In more familiar terms democratic equality rejects the difference principle and instead requires that '[O]nce all citizens enjoy a decent set of freedoms, sufficient for functioning as an equal in society, income inequalities beyond that point do not seem so troubling in themselves' (Anderson: 1999: 326).

These latter points require some elaboration. First, the requirements described by Anderson seem not very different from how the idea of a modern welfare state was conceptualized above: allowing for large inequalities and relying on modest *ex post* redistribution. Second, democratic equality does not seem to require equality of opportunity as understood by luck egalitarians. Instead, justice requires the capability to function equally as a citizen. That does not necessarily mean equality of opportunity as defined by Rawls. Furthermore, allowing wide inequalities in wealth and income may lead to political systems where those with more wealth and income can translate these resources into increased political influence and undermine the idea of equal citizenship.

Although Anderson's criticism points out important shortcomings in liberal egalitarian theories and in the way in which principles of justice are translated into politics, her own alternative seems also to be afflicted by some problematic features. Democratic equality is compatible with great inequalities between those with disadvantaged and more advantaged social backgrounds. Even if it is easy to agree that something has gone wrong in the liberal egalitarian quest for choice-chance sensitive equality, it is important to bear in mind that an important motivation for redistribution has been to ameliorate persistent inequalities based on class and social background. This concern is absent from the understanding of democratic equality. Although luck egalitarians go wrong in their esoteric quest for a choice-chance sensitive equality, leaving out the idea of equalizing across social class also seems to be a flawed way of conceptualizing equality. It is therefore unclear to what extent Anderson has taken into account the liberal egalitarian criticism of the traditional welfare state. For example, acceptance of wide inequalities and their consequences for citizens opportunities might contribute to upholding class inequalities. Avoidance of such class inequalities that give rise to highly unequal life prospects has long been an important target of egalitarianism in general. Although Anderson sets out to remedy the problems with liberal egalitarianism she seems to be vulnerable to some of the

problems liberal egalitarians see with the traditional capitalistic welfare state type of re-distribution. Therefore, it is hard to say if democratic equality really represents an improvement on liberal egalitarianism.

To sum up the contrast between luck egalitarianism and democratic equality, luck egalitarianism argues that what justice requires is radical re-distribution of wealth and privileges in a manner that is fair to the important choice-chance distinction. In the quest for a set of political institutions and schemes to achieve this ambition luck egalitarianism has gone wrong by suggesting solutions that are not only impractical, but are also narrowly focused; so much so they have lost sight of some of the important reasons why we should care about equality in the first place. Democratic equality criticizes and responds to this esoteric quest and proposes a simpler and neater understanding of what equality requires in complex democratic societies. However, it can be objected against democratic equality that the understanding of equality is too loose with the result that it does not address the importance of equalizing inequalities based on class and social background.

The upshot of all this is not necessarily to discredit either liberal egalitarianism or Anderson's alternative, but rather to point out the difficulties with deriving what liberal constitutionalist justice requires in relation to democracy. Luck egalitarians strive for detailed, and possibly highly intrusive, principles in their eagerness to realize justice. Democratic equality takes a different approach and holds that the implications of justice are more modest and that what is required is to ensure that citizens have the necessary capacity to function as equal citizens in modern industrialized societies. Democratic equality aims at equalizing (presumably through re-distributive schemes) up to the point where citizens have the capabilities to participate fully in the democratic process, hence democratic equality. However, the remarks by Rawls at the beginning of this section suggested that his egalitarian emphasis also had the same goal in mind when he formulated the principles of justice. In a way, it is therefore possible to say that both Anderson and the egalitarians she is criticizing share some of the same goals, but they differ widely when it comes to what is required to achieve these goals. Luck egalitarians and other egalitarians have a much stronger conception of what is required to achieve such equality, while from the perspective of democratic equality, being a functioning citizen requires less in terms of re-distributive schemes than is required by liberal egalitarianism.

Clearly, democratic equality goes much better with a strong commitment to democracy as the implications are not wide ranging. Democratic equality does not constrain the democratic process by imposing radical and demanding principles of re-distribution of wealth and privileges. Thus, this understanding of equality is easier to square with the understanding of democracy where the people is sovereign and the authority of a society's positive law. Luck egalitarianism in contrast has more wide ranging political implications that are harder to square with democratic and popular sovereignty, because it constrains the democratic process by imposing radical and demanding principles of re-distribution. The general conclusion to draw from the discussion in this section is first that, even if liberal constitutionalists are aware of the double commitment to justice and democracy when they discuss the implications of their principles, a strong conception of what social justice requires makes it difficult to square with democracy. Thus, the issue of social justice increases the difficulty for liberal constitutionalist theory of combining justice and democracy.

### **3. Political Justice: The Possibilities of Democracy**

So far it is clear that liberal constitutionalism is committed to justice and that this commitment threatens its commitment to democracy. In this section I will discuss the liberal constitutionalist commitment to democracy in more detail. This discussion seeks to reveal that liberal constitutionalism is as committed to democracy as it is to justice. That is because the liberal constitutional concern for democracy is derived from the foundational values of equality and liberty. Thus, democracy becomes a natural part of liberal constitutional thought. Equality and liberty give rise to both principles of justice and a democratic order. Acknowledging this closes off one possible solution to the dilemma of combining justice and democracy. If liberal constitutionalism was closer to either justice or democracy one way to resolve the dilemma could be to argue that either justice or democracy is its supreme value. However, if it is correct that both justice and democracy are equally important this solution is closed off, and it is necessary to find a solution able to balance the double commitment by giving equal weight to both justice and democracy.

The equal weight attached to both justice and democracy can be revealed through a discussion of the tasks of political philosophy. Jeremy Waldron has suggested 'two tasks for political philosophy: (i) theorizing about justice (end rights and the common good etc.), and (ii) theorizing about politics' (1999: 3). The first task

requires political philosophers to ask '[W]hat are the implications of (for example) John Rawls's theory of justice so far as democratic and constitutional procedures are concerned?' Concerning the second task one ought to ask '[W]hat are we to think about democratic and constitutional procedures, given that such procedures have to accommodate a politics for those who differ fundamentally about whether theories like Rawls's are correct?' (Waldron: 1999: 3). The two tasks of political philosophy distinguished by Waldron here are first (1) what does a specific theory of justice require, and (2) how can we establish procedures and a political system in the midst of profound disagreement over what justice is. Waldron here sees these as separate questions, and argues that (2) can be pursued independently of (1).

However, I believe that political philosophers must pursue both these questions, because they are hard to separate.<sup>4</sup> The reason why (1) and (2) cannot so easily be separated is that (2) presupposes (1). Effectively, (2) requires a theoretical starting point, and this can only be found through task (1). Waldron asks us to focus on how democracy can be possible under circumstances of disagreement. In a liberal context, this means that we must theorize about what a legitimate democratic order justifiable to everyone living under it would look like. Important to this task is to define the necessary and sufficient conditions for such an order, and this is where (1) and (2) connect. Defining the conditions of such an order is bound to rely on a wide range of moral and normative premises and principles. Examples of such notions are equality, liberty and impartiality. Without a clearly worked out position on how these notions are to be understood the task of (2) becomes clouded. To analyse if a political order based on, for example, equality, liberty and impartiality is justifiable and workable under conditions of disagreement it is crucial to know what the implications of these concepts are. Therefore, it is important to emphasize both tasks, because they are inter-connected and cannot easily be separated. The important point to stress here is that the pursuit of the implications of liberal constitutionalism must go along with the pursuit of what is required by a democratic order given pluralism and widespread disagreement.

This brief discussion suggests that there is reason to be sceptical about separating the two tasks of political philosophy in the way proposed by Waldron. Instead of giving priority to one of the tasks, it is important to bear both tasks in mind

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<sup>4</sup> Andrew Mason (2006) makes the same observation, although without discussing how the two tasks are related.

when doing political philosophy. Procedures of how to reach agreements on issues of common interest must be supplied with some standards of what is fair and just in determining the outcomes of questions of common interest. Obviously, it is likely that in diverse and pluralistic societies different people will disagree about these standards. When people disagree over how to interpret a certain principle or ideal an important question to ask is what a particular view requires in terms of political implications.

The second task is to work out how people with widely different and possibly conflicting interests can peacefully coexist without undermining the stability of society. This is a task that has worried many liberal constitutionalists and some have argued that the aim of liberal constitutionalism is not 'to tell us how to live. It addresses itself to a different but equally important question: how are we to live *together*, given that we have different ideas about how to live' (Barry: 1995: 77, original emphasis). Working out what this means involves working out a set of procedures for public decision-making that can be justified to all reasonable citizens, and it also involves working out the more substantive implications of those procedures. In this way, it is necessary to ask both about the implications of justice and about fair procedures for public decision-making. Thus, we see that in one sense the liberal constitutionalist commitment to democracy is strong because telling us how to live together cannot exclude a democratic framework if the political order is supposed to be based on equality and liberty.

Thus, taking democracy seriously is of paramount importance for liberal constitutionalists, as it is a requirement of the theory in the same way as is the commitment to civil and political rights. In fact, democracy constitutes the necessary framework for the important civil and political rights. The significance of this conclusion is that the commitment to democracy runs as deep as the commitment to justice (chapter six, section two will discuss this point in more detail). For liberal constitutionalists, a political model that does not take the commitment to democracy seriously is as unacceptable as a political model unable to offer proper protection of civil and political rights. This shows that the commitment to democracy runs as deep as the commitment to justice, and secondly, it shows that when the competing demands of justice and democracy conflict, liberal constitutionalists have no overarching principle to which to turn to reconcile such conflicts. This point raises an additional doubt as to whether the double commitment to justice and democracy can

be combined without being in tension and threatening the plausibility of liberal constitutionalism.

#### **4. Concluding Remarks**

The context surrounding liberal constitutionalism is increasingly complex and it sharpens the problem of how to combine justice and democracy successfully. The commitment to justice and democracy is supplemented by a commitment to liberal legitimacy and pluralism. Adding these supplementary conditions makes it harder to fulfil the commitment to justice and democracy. Pluralism implies that there is divergence on political and moral issues in society and this divergence makes the task of arriving at a political order acceptable to all those living under it even harder. Liberal constitutionalists suppose convergence on the workings of the political system (including civil and political rights), but given current moral divergence, Waldron argues that such convergence may be hard to achieve.

We have seen in this chapter that convergence on a political order is further complicated by the issue of social justice. Liberal constitutionalists are not only committed to ideals of democracy and fundamental rights, but also to ideals about social justice derived from their foundational values (equality and liberty). There are several problems attached to this commitment. First, it is not clear what the different principles require in terms of institutions, policies, etc. Second, it is not clear how this commitment to social justice can be squared with a commitment to democracy. In addition, we have seen in this chapter that liberal constitutionalism is as committed to democracy as it is to justice, as the concern for democracy is essentially derived from the value of equality and liberty. This made it clear that the dilemma of combining justice and democracy cannot be resolved through emphasizing justice over democracy, or democracy over justice.

A further difficult question in contemporary liberal theory is to what extent the competing demands between convergence and divergence can be met. Because of moral and political divergence, the political order justifiable to everyone living under it must be thin in that it cannot rely on thick moral notions. This means that to satisfy the principle of liberal legitimacy a political order must exclude controversial moral notions that could reasonably be rejected by those living under this order. This leads us in the direction of a neutral or impartial political order. The difficulty is that liberal political theory requires convergence on a political order, while the divergence in

society makes this difficult. For liberal constitutionalists the specific difficulty lies in arriving at a political model weak enough to accommodate divergent moral and political views, but at the same time strong enough to yield distinctively liberal conclusions. In the next chapter, I will discuss two approaches to how the competing demands of divergence and convergence are combined in contemporary liberal theory.

## CHAPTER TWO

### The Boundaries of Reason in Liberalism

*There has been a controversy... concerning the general foundation of Morals; whether they be derived from Reason, or from Sentiment; whether we attain the knowledge of them by a chain of argument and induction, or by an immediate feeling and finer internal sense; whether like all sound judgement of truth and falsehood, they should be the same to every rational intelligent being; or whether like the perception of beauty and deformity, they be founded entirely on the particular fabric and constitution of the human species.*

David Hume<sup>5</sup>

Contemporary discussions of the role of reason in liberal thinking often distinguish between Reformation and Enlightenment liberalism. Recall from the Introduction that the former employs a weak notion of reason with wide room for accommodating divergence of reason. The latter employs a thicker notion of reason and supposes convergence of reason on a wider set of questions. Both these representatives of liberal theory draw their inspiration from two of the most important transformative periods in European history. Reformation liberalism traces its intellectual roots back to the religious wars in Europe during the 16<sup>th</sup> and 17<sup>th</sup> centuries. Enlightenment liberalism in contrast traces its origin back to the optimistic view of the possibilities for human moral progress and the idea of a universally shared notion of reason that was influential during the 18<sup>th</sup> and 19<sup>th</sup> centuries. The purpose of this chapter is to discuss the role of reason in contemporary liberal theorizing and to argue against the stark distinction between Reformation and Enlightenment liberalism.

The Reformation theory I will discuss does not see reason as the foundation of morality. Instead, the foundation is found in the advantages one derives from social cooperation with other members of society. These advantages are a form of sentiment as they are based more on ‘immediate feeling’ and are dependent on what human beings find agreeable or not. The Enlightenment views I will discuss derive the foundation of morality from reason: they base their theories on ‘a chain of argument

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<sup>5</sup> *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, p. 170.



and induction' and hold that these arguments and the notion of rationality 'should be the same for every rational intelligent being' to paraphrase the passage above by Hume. In this chapter I will discuss in more detail how these two approaches seek to satisfy the principle of liberal legitimacy while still being sensitive to the high level of diversity and moral pluralism present in most modern societies.

Trying to combine liberal legitimacy while simultaneously seeking to accommodate pluralism is a difficult task and leads to a dilemma for liberal political theory. Reformation liberalism's emphasis on accommodating diversity and the toleration of moral and religious pluralism runs the risk of paying too much attention to diversity without ensuring adequate protection for individual rights. In contrast, Enlightenment liberalism has the opposite problem. Enlightenment theories argue that through reasoning all sound adults can arrive at the same conclusions regarding a relatively wide and comprehensive set of moral and political questions. However, this runs the risk of being insensitive to the diversity of moral beliefs and conceptions of the good. Thus, the dilemma faced by contemporary liberals is that their theories are either too strong or too weak with respect to diversity and consensus. The crucial issue is how this dilemma can be resolved to salvage liberal theorizing.

Both these rival understandings of liberalism capture important elements embodied in liberal justice. However, ultimately I believe neither description is fully adequate for understanding the role of reason in liberal justice, and in contemporary theories of liberalism in general. Although there are elements within liberalism moving in opposite directions, to distinguish between Reformation and Enlightenment liberalism I will argue is wrongheaded. Instead, I will in this chapter first hold that it is wrong to think of liberalism as either reason based or diversity based (as the distinction between Reformation and Enlightenment liberalism suggests). Instead, liberal theories are bound to rely on both these elements. Distinguishing between Reformation and Enlightenment liberalism does not exhaust the understandings of reason that are possible (and plausible) within liberalism. In addition, Reformation and Enlightenment liberalism are not mutually exclusive.

Part of the argument I will advance in this chapter is that liberalism is bound to some extent rely on convergence of reason, but that is not the same as relying on a controversial notion of reason that invokes the ideals of autonomy and moral progress associated with the Enlightenment. Even if neither Reformation liberalism nor

Enlightenment liberalism is entirely satisfactorily, I argue that elements of both are required of a workable liberal theory.

Reformation and Enlightenment liberalism present a dichotomous view of reason. A second part of the argument in this chapter is that liberalism ought to understand reason as being within an upper and lower boundary. These boundaries require more convergence than Reformation liberalism, but less convergence than Enlightenment liberalism. The task is therefore to balance the competing demands from convergence and divergence, rather than to choose one side. My point in this chapter is not to say that the truth lies somewhere between two extreme positions, but that it is a mistake in the first place to think of two opposing and mutually exclusive ideals.

My discussion proceeds by first elaborating the distinction between Reformation and Enlightenment liberalism. I then discuss an example of Reformation liberalism based on mutual advantage and game theory where convergence on controversial political and moral truths is minimal. I argue that this attempt fails from a liberal point of view because abandoning a notion of public reason altogether will not satisfy the liberal precept of a universally justifiable political order. I then continue by discussing two theories exemplifying Enlightenment liberalism, emphasising the role of deliberation and reasonable pluralism. I argue that neither of these two alternatives is suitable as a foundation for justice, because their underlying premises rely on too strong a notion of reason. In the final section, I discuss the insights of the three first sections to see whether there is some alternative way of thinking of contemporary liberalism other than merely as caught between convergence and divergence of reason.

## **1. Reformation and Enlightenment Liberalism**

In this section, I will first offer brief definitions and discussions of the terms Reformation and Enlightenment liberalism. Then I will discuss how these two terms relate to contemporary theories of liberalism. Finally I will discuss how this distinction relates to deep and serious questions about the possibility of satisfying the liberal principle of legitimacy.

The distinction between Reformation and Enlightenment liberalism relies in turn on a distinction between diversity versus autonomy and reason. The claim is that Reformation liberalism was initiated by the pressure from growing religious diversity

during the Reformation period in the 16<sup>th</sup> and 17<sup>th</sup> centuries. Furthermore, the liberalisms of the Reformation aimed to show how the violent conflicts sparked by religious diversity could be peacefully resolved. Important in this respect was the development of a concept of toleration of different Christian denominations (e.g., Locke: 1689). This eventually gave rise to civil rights such as freedom of religion and freedom of speech.

By contrast, Enlightenment liberalism developed out of the optimistic view of human progress that was influential during the 18<sup>th</sup> and 19<sup>th</sup> centuries in much of Europe. It was based on a firm faith in the capacity of human reason to arrive at correct decisions. Historical representatives of this type of liberalism are Immanuel Kant and John Stuart Mill. The significance of the distinction between the two kinds of liberalism is that Reformation liberalism leads to toleration and divergence of reason, while Enlightenment liberalism relies on autonomy and the supposed convergence of reason. I will now examine in more detail what is at stake in distinguishing between these two versions of liberalism.

Rawls points out that the ‘Reformation had enormous consequences’ and meant ‘the appearance within the same society of a rival authoritative and salvationist religion,’ which led to asking: ‘How is society even possible between those of different faiths? What can conceivably be the basis of religious toleration’ (Rawls: 1996: xxv-xxvi)? These two questions are as important today as they were during the time of the Reformation because contemporary democratic societies are perhaps even more marked by religious, cultural and ethnic pluralism than the societies of the European Reformation. A central premise for Rawls is that a large part of this pluralism is reasonable, because the free use of reason leads to a diversity of answers to religious, moral and political questions (Rawls: 1996: 54-58). The solution to how peaceful coexistence between different religions is possible must therefore take into account the diversity of conceptions of the good found in most democratic societies.

This view can be contrasted with the 18<sup>th</sup> and 19<sup>th</sup> century liberals who ‘hoped to establish a basis of moral knowledge independent of ecclesiastical authority and available to the ordinary reasonable and conscientious person’ (Rawls: 1996: xxviii). This project saw its most sophisticated expressions in Mill’s and Kant’s ideals of individual autonomy (Rawls: 1996: xliv). Mill, for example, not only advanced an

ideal of autonomy,<sup>6</sup> but also famously claimed that: ‘as mankind improve[s], the number of doctrines which are no longer disputed or doubted will be constantly on the increase: the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested’ (Mill: [1859] 1991: 49). Mill’s optimism about convergence has been doubted in recent years, when we have witnessed an increase, rather than a decline, in diversity.

The fundamental problem with this way of understanding reason is that Mill and Kant not only set out ideals that were to apply universally to a justified political order, but also went beyond these and set out moral ideals for which they also claimed universal scope. However, clearly the ideal of autonomy in Mill and Kant is incompatible with those conceptions of the good that reject autonomy. Thus, an ideal of autonomy, for example, cannot serve as the foundation of a political order in societies marked by pluralism because it is bound to exclude a wide range of conceptions of the good that are not based on the value of autonomy. Furthermore, basing a political order on doctrines embodying specific moral ideals is at odds with the idea that the state ought to be neutral between different conceptions of the good. The liberalism of Mill and Kant is therefore a blind alley for those who seek to justify a just political order in conditions of reasonable pluralism, as those who are not adherents of autonomy as a moral ideal have good reason to reject a political order based on it.

Essentially, the crucial distinction this brief discussion of Reformation and Enlightenment liberalism points towards is that Reformation liberals suppose that reason will naturally diverge, while Enlightenment liberals suppose that reason will naturally converge. Proponents of the distinction between Reformation and Enlightenment liberalism argue that liberalism can offer a justifiable political order by changing the emphasis from autonomy and a strong shared notion of reason to a framework where the pluralistic nature of modern societies is appreciated and taken into account. One of the strongest proponents of Reformation liberalism, William Galston, holds that this shift of emphasis is not only of theoretical and philosophical importance but that the two understandings of liberalism ‘point in quite different directions in currently disputed areas such as education, rights of association, and the

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<sup>6</sup> It should be noted that Mill himself did not use the term ‘autonomy,’ instead, he used the term ‘individuality,’ which refers to the capacity to make independent decisions about what is in one’s best interest and about how to live one’s life. This term and use of it correspond well with understanding autonomy as the capacity to make up one’s mind about religious, moral and political issues.

free exercise of religion' (Galston: 1995: 521). Liberalism ought not assume that universal answers to these issues can be found even within the most homogenous societies. Instead of assuming that this is possible, 'liberalism is about the protection of diversity, not the valorization of choice... To place an ideal of autonomous choice – let alone cosmopolitan bricolage – at the core of liberalism is in fact to narrow the range of possibilities available within liberal societies (Galston: 1995: 523).

The significance of distinguishing between Reformation and Enlightenment liberalism is not restricted to a discussion of identifying the roots of modern theories of liberalism. In fact, the discussion raises important questions concerning what is a legitimate political authority, what are our political obligations to a legitimate political order, and ultimately what are the reasons liberals can offer non-liberals for supporting liberal institutions. All these questions pose deep challenges for liberals, but are crucial in making a liberal project both philosophically defensible and politically viable. Perhaps the most serious question to answer (and the most serious threat to liberalism) is how liberals can justify liberal institutions to non-liberals. Offering detailed answers to these important questions is beyond the scope of this thesis, but some of these issues will be discussed in later chapters.

The difference between Reformation and Enlightenment liberalism is that the latter requires more convergence on a wider range of issues than the former. More specifically this means that the political order derived from Reformation liberalism will embody fewer substantive principles than a political order based on Enlightenment liberalism. Furthermore, Reformation and Enlightenment liberalism have different political implications. The great challenge with the principle of liberal legitimacy is that if the political order is either too weak or too strong it fails to offer a political order that is legitimate to everyone living under it. If a political order makes too many concessions to accommodate diversity and moral disagreement, it runs the risk of not being able to protect fundamental rights. Likewise, if a strong and thick political order influenced by Enlightenment liberalism is advanced, it presupposes convergence of reason on issues where reasonable citizens may disagree. If the notion is not strong enough, the political order ceases to be a liberal political order, and if the political order is too strong, it coerces citizens to comply with an ideal of liberalism that is highly controversial. Neither of these positions is attractive and both question the legitimacy of the political order. What this amounts to is that liberal theories must find an alternative to these two approaches to satisfy the two background conditions

discussed in the previous chapter. To see this more clearly I will, over the next two sections, discuss three alternative ways of reconciling liberalism with the demands of pluralism and diversity.

## **2. Politics as Coordination**

An appealing strategy to come to terms with the demands of diversity and to satisfy the liberal principle of legitimacy is to think of such accommodation as a coordination game between conflicting interests. Such a view represents a ‘minimum’ conception of reason, because it relies on the assumption that acceptable solutions are those in the interests of all the parties, or optimal from the perspective of game theory. In one important respect, this approach is well-suited to accommodate diversity because it does not appeal to reason, but instead to the advantages citizens receive from social cooperation. A high level of divergence of reason can therefore be tolerated as long as social cooperation is more beneficial than non-cooperation for the members of the society. Furthermore, since the idea of benefits received from social cooperation is doing the real work here, a notion of public reason shared by the members of society becomes redundant.

It is instructive to start an analysis of how to deal with diversity with this approach, because it points in the direction of the advantages of a weak notion of reason. A weak version of reason is attractive because it waters down the number of assumptions that must be shared, and as such is minimally controversial. This seems to be exactly the kind of solution required by the critics of Enlightenment liberalism. Central to the main argument of this chapter is to show that Reformation liberalism and Enlightenment liberalism are not mutually exclusive, as elements of both are needed to deliver a workable liberal political theory. Examining reason as a coordination game is a useful step in supporting this conclusion, although I believe this approach ultimately fails. Nonetheless, it is instructive as a starting point to identify the lower limits of reason and so define the boundaries of reason in liberalism.

The central ideas underpinning this approach are simple to grasp intuitively, and appear as an attractive starting point to accommodate diversity. The central premises are that (1) society is marked by deep disagreements over a wide range of questions such as justice, the meaning of life and what a good society is, and (2) these disagreements lead to potential political conflicts, but (3) we also derive benefits from cooperating with other persons. Given that divergent opinions have the potential to

cause conflict, and given that we gain benefits from cooperating, we have an interest in avoiding the conflicts that make cooperation difficult. This leads us to the conclusion that we must coordinate our divergent ideas about justice and what a good society is to continue to reap the benefits from social cooperation.

Concerning (1) and (2) Jeremy Waldron, a proponent of this view, describes the level of disagreement in society in the following dramatic terms: ‘There are many of us, and we disagree about justice... we disagree also about what count as fair terms of co-operation among people who disagree about the existence of God and the meaning of life. We disagree about what we owe to each other in the way of tolerance, forbearance, respect, co-operation, and mutual aid’ (Waldron: 1999: 1). We see that these claims about disagreement resemble the same claims underlying the critique of Enlightenment liberalism. Our use of reason does not lead to convergence on moral and political issues. Rather, it leads to divergence, and according to Waldron disagreement runs deep: in modern societies people disagree about almost all moral and political issues.

Because of the deep disagreement in modern societies, ‘a person should not be surprised to find himself from time to time under a legal obligation to participate in a scheme that he himself regards as undesirable on grounds of justice’ (Waldron: 1999: 7). For example, a person may find himself in a society where the legal system discriminates against women and he is under legal obligation to obey this system even if he strongly disagrees with it on grounds of justice. We must be prepared to make such sacrifices in order to continue to receive the benefits of social cooperation. Given the deep level of disagreement, to find oneself under such obligations might not be surprising, but on what grounds can such obligations be justifiable? This is where the idea of how we benefit from social cooperation comes under pressure. Although we disagree strongly, we have an interest in preserving the benefits of social cooperation amid fundamental disagreements, which is the third premise identified above.

The authority of law rests on the fact that there is a recognizable need for us to act in concert on various issues to co-ordinate our behaviour in various areas with reference to a common framework, and that this need is not obviated by the fact that we disagree among ourselves as to what our common course of action or our common framework ought to be.

(Waldron: 1999: 7)

The felt need and benefits associated with coordination on some matter outweigh the disadvantages associated with finding oneself under political obligations one strongly disagrees with. Essentially, coordination is to our mutual advantage. It is rational to accept coordination, even if the chosen outcome goes against our preferred alternative. The person above who is situated in a society discriminating against women has reason to put up with this because he also receives great benefits from the current social arrangements. Thus, the crucial point is that the advantages of social cooperation outweigh the disadvantages associated with possibly unjust political obligations from the perspective of an individual.

This view rests on the claim that coordination is preferable to non-coordination even if the outcomes of bargaining deliver something thought to be morally wrong according to one of the coordinating parties. This is a strong claim and the potential consequences of it point to a weakness with this approach. If it is the case that coordination is always preferable to non-coordination, this might have two unintended implications. First, it means that coordination games where the parties are allowed to use their threat advantage and relative bargaining power to skew the outcome in their preferred direction are acceptable, since the solution is nevertheless superior to non-coordination. Some might not only experience that they live under a legal and political framework they strongly disagree with, but also under an order they are forced to accept. In the previous chapter we saw that from the perspective of liberal constitutionalism there are weighty reasons not to accept a political order based on mutual advantage as relative bargaining power might force weak parties to accept schemes strongly disfavoured by their basic interests.

Secondly, this also means that a legal and political order penetrating almost every aspect of life is preferable to non-coordination. Hence, strongly oppressive laws and regimes might be permitted on this account, if the overall advantages outweigh the disadvantages. This position is problematic from a liberal point of view as it does not offer a firm protection to the interests of the individual. For example, coordination might give rise to a political order with little room for individual discretion and privacy. On this view, almost any government would be better than no government, as a government would guarantee some order and predictability. However, not every aspect of life ought to be under political control.



These two consequences of coordination are decisive objections to this approach. Use of threat advantage and potentially limitless political power seems not to be very reassuring for those who find themselves under a legal and political order with which they strongly disagree. If this order came about by the use of force or is potentially limitless, then there are good reasons for those who disagree with the legal order not to accept it. Although coordination is superior to non-coordination and the benefits associated with social cooperation are strong reasons to accept the order, politics as coordination is not necessarily persuasive from a liberal perspective. Relying on the idea that coordination is in general better than non-coordination even when producing morally wrong outcomes is contentious. Underlying this view is either the idea that non-coordination will have disastrous consequences or that the benefits from social cooperation exceed those of non-coordination. Both these assumptions are questionable. Non-coordination gives associations to a Hobbesian state of nature and as Gerald Gaus observed: ‘We can depict Hobbes’s state of nature as a no-agreement point, and all civil societies as equilibrium points. The power of Hobbes’s characterization of the state of nature is that it is so horrible that every conceivable political society is a coordination equilibrium that Pareto-dominates every non-coordinated point’ (Gaus: 2003: 92-93). The persuasiveness of politics as coordination depends on these controversial assumptions. By describing the circumstances of non-coordination as less disastrous the number of civil societies appearing attractive diminish, and non-coordination more plausible. Similarly, reducing the benefits of social cooperation has the same effect by making non-cooperation more attractive.

The important in with discussing these assumptions is that if non-cooperation (the state of nature) is described in more favourable terms, and the benefits of social cooperation are thought of as less than is assumed on this model, then those who find themselves under a legal and political order they object to on grounds of justice have weaker reasons to accept it as superior to non-cooperation. Hence, they have more reason to endorse the idea that the outcomes of politics must not be based on relative bargaining power and ought instead to be constrained within certain limits. The crucial question is ‘why should I accept a legal or political order with which I strongly disagree?’

Waldron’s response to this question assures us that ‘people sometimes or often vote their considered and impartial opinions when they are addressing controversial

issues of justice and rights... citizens and representatives often do vote on the basis of good faith and relatively impartial opinions about justice, rights, and the common good' (Waldron: 1999: 14). I will not quarrel with Waldron on the possibility of impartiality, as a central premise of this thesis is that impartiality has some merit. What I want to draw attention to is that an appeal to impartiality is at odds with premise (1) above. If disagreement runs as deep as described by (1), how can it then be possible to rely on impartiality? Surely, it must be difficult to discern a common interest or arrive at a definite understanding of 'good faith' given the level of disagreement we are faced with according to (1).

Waldron might reply that the idea is not that people necessarily agree on what is in the common interest or what impartiality means, but that they sincerely try to make an effort to think of what is in the common interest and what impartiality requires. The question is if this reply is strong enough to persuade the person who is obliged by a legal and political order with which he strongly disagrees? I believe not, because if disagreement runs as deep as suggested by Waldron then people are likely to think of the common interest and impartiality in terms of their own understanding of justice, fair terms of social cooperation, rights, etc., because there is no shared basis for convergence on these terms. Furthermore, what kind of motivation do the citizens in Waldron's society have to act impartially? Essentially, politics as coordination is a mutual advantage theory, and if one group see the opportunity to invoke principles or policies undermining the equal worth of members of other groups there is nothing to stop them from doing exactly that. This aspect of mutual advantage is precisely what makes it objectionable from the perspective of liberal constitutionalism, because it violates strong intuitions about equality and impartiality.

Alternatively, impartiality can be understood in a stronger sense where there is some convergence on what the common interest and impartiality require. If so, this is a much stronger notion of impartiality and the common interest than is expressed in (1) above. For Waldron's argument to be coherent, he must either reject this more substantive understanding of the common interest and impartiality, or he must accept the weak notion that does not offer anything more than the current order. Waldron cannot have it both ways. He cannot both say that disagreement runs so deep that almost no agreement is possible and at the same time state that it is possible to discern a clear and uncontroversial meaning of what the common interest and impartiality mean.

These remarks merge into a concluding point concerning politics as coordination. Waldron is aware of the high level of disagreement in modern societies and I think he is correct in thinking that given diversity and pluralism it is necessary to assume a weak understanding of reason because convergence on a wide set of assumptions is unlikely to arise. So, the starting point is at least the right one. However, the problem is that politics as coordination does not offer an attractive answer to those who disagree with the outcome of the decision-making process. We saw in the previous chapter how important to liberal political theory a political order justifiable to everyone living under it was, and it is on this crucial question that politics as coordination fails. It simply has no compelling answer to offer those who disagree with a given political order. There is a worry with coordination theories that in the end they just become power struggles. To cover that hole in the argument, it is necessary to introduce substantive moral premises such as the common interest and impartiality, which undermine the view that disagreement permeates every aspect of politics.

The insight to draw from this discussion of Waldron is that although it is attractive to try to build a civil order on as weak assumptions as possible given diversity and pluralism, Waldron's proposal is too weak to yield a political order justifiable to everyone. In the end, to strengthen the plausibility of his theory, auxiliary arguments based on the common interest and impartiality are required to yield justifiable conclusions. However, introducing these elements reveals that a political order must be based on something stronger than coordination to be persuasive. In the next section, I discuss two liberal approaches which share the conviction that a legitimate political order must acknowledge diversity and pluralism, but which have stronger substantive assumptions than can be found in Waldron's theory.

### **3. The Politics of Consensus**

While Waldron holds that a political order may be justifiable even if a morally wrong political order may follow, Jürgen Habermas and John Rawls (whom I discuss in this section) are concerned with how thicker assumptions can provide a justifiable framework for a political and legal order. Both are aware of the significance of diversity, and both seek to present the elements of a political order that would be justifiable to everyone given diversity and pluralism. However, if Waldron's approach was too weak in the end, the approaches advanced by Habermas and Rawls seems to

be at the opposite end of the scale in that they assume rather strict and strong requirements for a justifiable political order.

My discussion in this section does not aim at a full treatment of these thinkers' ideas about the role of reasoning in relation to politics. My treatment of both Rawls and Habermas here is rather cursory, but it does take issue with some of the aspects of their theories commentators have often found questionable. Nonetheless, I do not claim, or aim for, a wholesale rejection of their theories. What I aim for instead is to point out some potential difficulties with their theories that are relevant for discussing the role of reason in liberal constitutionalism.

To start with Habermas, a central idea underpinning his political philosophy is that moral justifications demand 'real cooperative effort' (Habermas: 1991: 67). Only through actual deliberation of all affected can it be shown that a principle is valid. This idea leads to the following condition that a principle must satisfy: '*All* affected can accept the consequences and side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation)' (Habermas: 1991: 65, original emphasis).

This view is a striking contrast to Waldron's position discussed in the previous section. For Waldron it was acceptable and legitimate that a morally wrong political order with which citizens disagreed strongly was still justifiable because the gains that citizens derived from social cooperation outweighed the disadvantages of the legislative order with which they disagreed. For Habermas it is imperative that the political and legal order is morally acceptable to all those living under it. Although citizens will benefit more than they lose, it is necessary that a principle is justifiable to everyone.

Examples of principles on which this process of deliberation can reach consensus are principles of justice and morality, while questions about values – what constitutes a good life – cannot be resolved through deliberation (Habermas: 1991: 108). Habermas' argument is that principles of justice and morality are both within the realm of rationality and it is therefore possible to reach consensus on these issues. Questions about values are not subject to rationality to the same extent because they are more subjective. Consensus on issues of justice and morality is exactly what the critics of Enlightenment liberalism deny given our plural societies.

I think there are two points to be made in relation to Habermas' account. First, it is unlikely that consensus can be reached on all questions of justice and morality. Consensus is unlikely partly because morality and justice cover such a vast number of questions. It is one thing to agree on principles for democratic decision-making and basic questions of justice, but quite another to settle the question of abortion through deliberative practices and reach a consensus acceptable to everyone. The scope of possible consensus seems too wide on Habermas' account. The problem with Habermas' account is that he requires consensus on a too wide range of questions. For it to be possible to reach a consensus on all questions of justice and morality it is necessary that rationality is subject to wide interpersonal comparison. The level of disagreement in most modern societies does not show that consensus is impossible, but it seems to be extremely difficult to reach consensus on all questions of justice and morality. To insist that questions of justice and morality can be settled through deliberation and discourse seems to be to neglect the idea that reasoning leads to ever-increasing divergence rather than convergence.

Furthermore, it is difficult always to see the crucial difference between, on the one hand, questions of morality and values, and on the other hand, how to live a good life. Many moral questions are precisely questions about how we attach value to certain ideals. In the case of abortion it is crucial for our conclusion whether we attach value to the importance of the choice of women to determine whether they want to end or continue the pregnancy, or whether we attach importance to the rights of the foetus. Claiming, as Habermas does, that values and questions of morality are separate is questionable.

Second, even if it were possible in principle to reach consensus on both questions of justice and morality, it is debatable to what extent the conditions Habermas describes can actually be realized in modern and diverse societies. Indeed, Habermas himself acknowledges that we must often resort to majority rule. He writes:

Majority rule retains an internal relation to the search for truth inasmuch as the decision reached by the majority only represents a caesura in an ongoing discussion; the decision records, so to speak, the interim result of a discursive opinion-forming process. To be sure, in that case the majority decision must be premised on a competent discussion of the disputed issues, that is, a discussion conducted according to the communicative presuppositions of a corresponding discourse. Only then can its content be viewed as the rationally motivated yet

fallible result of a process of argumentation that has been interrupted in view of institutional pressures to decide, but it is in principle resumable.

(Habermas: 1996: 179)

What is left, then, is the idea that the democratic process must be conducted in the manner described above, and in the spirit of trying to achieve consensus. Watered down in this manner, one might ask how different Habermas' account is from more standard views about democracy, such as Robert Dahl's (1956 and 1989), which rely on a more aggregative view of the democratic process. Majority rule seems always to embody some element of aggregation, and is not always sensitive to the ideas of a discursive and deliberative process. It is not particularly well suited to capture the emphasis on consensus on questions of justice and morality as described by Habermas.

I take these points to suggest that basing a legitimate political order on deliberation leading to consensus is highly demanding and does not seem to relieve critics of Enlightenment liberalism of their worries about the convergence of reason. Although consensus is in the end rejected, Habermas' theory is clearly in the spirit of Enlightenment liberalism when asserting that questions of justice and morality are suitable for reaching consensus. The remarks by Habermas mirror Mill's position in the sense that they envisage a future in which the human capacity to reason will yield an ever-growing body of truths shared by humanity, and this is precisely what is problematic with Enlightenment liberalism.

Moving from Habermas to Rawls, we see the same tendency to base a legitimate political order on consensus. In this section I will focus on some aspects of Rawls's later work, which suggest that he is more closely aligned to Enlightenment liberalism than Reformation liberalism, although Rawls himself in his later work seeks to identify himself more closely with Reformation liberalism rather than Enlightenment liberalism. The question Rawls asks is: 'How is it possible for there to exist over time a just and stable society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines' (Rawls: 1996: xxxix)?

I believe this question is certainly one of the most important questions liberals must answer, and in a sense it contains the crux of what contemporary liberal

philosophy aspires to (accommodating pluralism and offering a political order justifiable to all those living under it). This question also captures the idea that contemporary societies consist of a wide plurality of religious and moral doctrines, which fits in with the idea of Reformation liberalism. We also saw in the first section of this chapter how Rawls is trying to distance himself from the liberalism of, for example, Kant and Mill. At the same time, Rawls acknowledges that it is necessary that there be convergence on justice (1996: xx). This position is compatible with a notion of reason weak enough to accommodate diversity and pluralism, and still strong enough to yield a liberal framework. It is also a position much stronger than the idea that politics is essentially about coordination. Instead, the aim is a position defensible to each and every citizen. Rawls' question is clearly interesting as it strives to strike a balance between the strong and the weak elements present in liberalism.

Asking this question leads eventually to the 'principle of liberal legitimacy', which is stated in the following terms by Rawls: 'our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason' (Rawls: 1996: 137). Certainly, this principle contains the crux of the liberal idea of impartiality between different conceptions of the good. This idea is not only an important element of Rawls' theory, but is central in the theories of other important liberal theorists (as we saw in the previous chapter).

Although Rawls clearly wants to distance himself from the Enlightenment liberalism of Kant and Mill, he still supposes convergence on a number of controversial ideas. For example, as part of his endeavour to reach an overlapping consensus on justice between reasonable doctrines he argues that it is necessary to accept the objectivity of political judgements (Rawls: 1996: 110-131). Rawls claims that the moral principles derived from 'an objective procedure of construction that expresses all the relevant requirements of practical reason are "most reasonable" and provide the grounds for claims of moral truth of more particular judgments' (Freeman: 2007: 357). The idea of the objectivity of political judgments requires 'that a conception of objectivity has an account of agreement in judgment among reasonable agents' (Rawls: 1996: 112). The problem with the idea of objective political judgements is the same as the problem Rawls identified in Kant and Mill; that they relied on a controversial notion of rationality that was objective in the sense that the

use of reason would yield intersubjective moral and political agreement. In introducing the idea of the objectivity of political judgements Rawls is simply relying on some of the same controversial notions as the theorists he criticises and from whom he wishes to dissociate himself.

Nonetheless, Rawls is aware of the difficulties associated with relying on objectivity and the possibility of agreement on political judgements, and holds that it is reasonable to assume that citizens disagree even 'in cases of constitutional essentials and matters of basic justice' (Rawls: 1996: 241). Thus, even if objectivity is required, this weak understanding of objectivity suggests that Rawls relies on a substantively weaker account than, for example, Mill.

Despite this weakening of the objectivity requirement there is another feature that suggests that the objectivity of political judgements is to be understood in a stronger way. As part of acknowledging the reasonableness of disagreement even 'in cases of constitutional essentials', it is at any time legitimate to appeal to 'our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support' (Rawls: 1999b: 144). This additional feature suggests that there are two kinds of reasons that can be given in favour or against a principle or policy. The first kind of reason is a reason originating in our own conception of the good. That is to say, this type of reason is based on premises and considerations that apply specifically to this view. The second kind of reason is a public reason that does not originate within a specific conception of the good, but instead appeals entirely to 'a political conception of justice' (Rawls: 1999b: 144).

However, it is unclear what kind of work the reason originating within a conception of the good is actually doing, since in a political conception of justice the decisive reason will necessarily be the public reason based on political values. Even if an appeal to reasons originating within one's conception of the good is legitimate, it can only be done if there are additional public reasons supporting the same policy or principle. In the end the scope for appealing to reasons from within one's conception of the good is highly limited and contingent on there being a public reason for the same policy or principle. Requiring public reasons in this way undermines the minimalistic and weak understanding of reason, strongly restricting the kind of reasons that are acceptable as public reasons, and this pushes the notion of reason again back towards Kantian and Millian understanding.



What I want to draw attention to is the fact that the features mentioned above all slant Rawls's re-formulation in the direction of Enlightenment liberalism. Furthermore, the attempt to create a justifiable political order does not necessarily need to take the form of Waldron's minimalistic order, centred on coordination and benefits from social cooperation. In fact, a point that can be made from the examination of Habermas and Rawls in this section is that even if both theories seem to apply a strict notion of reason it might be impossible to base a justifiable political order on merely a weak or minimalistic conception of politics. The underlying point is that liberalism cannot escape some reliance on reason. The crucial question is how strong the understanding of reason ought to be.

The discussion in this and the previous section has given us some ideas about the limits of reason in liberalism. Although Enlightenment liberalism leaves a bad taste in the mouth of many liberals it is hard to see how a political order not based on convergence on certain crucial issues is feasible. Keeping these different and opposing perspectives in mind is useful for working out which of these strategies should be adopted by liberal constitutionalism, and in the next section I will bring the perspectives discussed here and in the previous section together by asking how liberalism can respond to the competing demands from divergence and convergence of reason.

#### **4. Balancing Divergence and Convergence of Reason in Liberalism**

I will now argue that the discussions in the previous sections point out that a strict distinction between Reformation and Enlightenment liberalism cannot be maintained because liberal theories cannot be exclusively defined by either approach. Instead, an important insight is that the notion of reason in liberalism must be strong enough to avoid the use of threat advantage and require convergence of reason regarding this point. At the same time, diversity makes it difficult to require consensus on all questions of justice and morality and to suppose the objectivity of political judgements. With respect to these issues, divergence of reason is legitimate. The solution is therefore to articulate a political order embodying elements of both Reformation and Enlightenment liberalism. Hence, Reformation and Enlightenment liberalism are not mutually exclusive. A plausible understanding of reason in liberalism needs elements derived from both approaches. To substantiate this point I will examine four insights from the discussions of the previous sections.

I have argued that politics considered just as coordination has two serious drawbacks. First, it permits the use of relative bargaining power and threat advantage. Second, it does not include any limits on the use of political power as long as the gains from social cooperation outweigh the disadvantages from living under a political order with which one disagrees. Coordination, thus, sets few constraints on the use of reason. To avoid the unintended drawbacks of threat advantage and unlimited political power Waldron was in the end forced to invoke the value of impartiality. However, he does not define impartiality and indeed insists that widespread disagreement over the implications of justice make it impossible to reach a useful definition of it.

The first insight we can draw from politics as coordination is that the high level of disagreement present in most modern societies sets strict limits on the number of things one can expect to be the subject of consensus. In response to this point Waldron concluded that it is plausible to accept living under a legal and political order with which one disagrees, because the gains from social cooperation still outweigh the disadvantages associated with that order. These gains are what make politics as coordination justifiable to all. Politics understood as coordination avoids the difficulties with defining reason in a way justifiable to everyone. Nonetheless, this has a cost; threat advantage and unlimited political power are permissible, and these side-effects may threaten important interests of the person such as the opportunity to live a life in accordance with his or her own will. They may also force a person to accept highly unfavourable conditions based on weak bargaining power. Although this order places few constraints on reason, and thus can accommodate wide political disagreement, it may justify morally dubious political orders. A second insight to draw from politics as coordination is that despite the attractiveness of basing a political order on coordination, it comes at a high cost. This points in favour of a political order based on a thicker (although potentially more controversial) foundations. From a liberal constitutional perspective, this means that at least the use of threat advantage and potentially unlimited political power must be avoided. Thus, convergence on the acceptability of these two issues is required.

While coordination places few limits on reason, Habermas and Rawls place many more restrictions on reason. My brief discussion pointed out how their theories relied on ideal conditions for reasoning in politics with a strong emphasis on ideal deliberation and consensus. In some respects, their views can be criticized for relying on an overly optimistic view of the possibilities of reaching consensus. Of course, this

is not to deny that their views contain many valuable insights. Attractive features of both views are that they offer strong protection to the interests of the individual through their emphasis on consensus. However, the emphasis on consensus also gives rise to concern. Both views end up as highly demanding both at a practical level and concerning their conceptualization of public reason. Leaving the practical difficulties with consensus aside for a moment, both Habermas and Rawls demand that citizens subscribe to controversial propositions such as the objectiveness of political judgements and a highly idealized version of deliberative democracy. Obviously, the more controversial propositions that are built in the harder it is to accommodate pluralism, but importantly it is necessary to rely on some sort of shared notion of public reason to avoid the collapse of the political into mere coordination. The crucial question for Habermas and Rawls is if their accounts build in too many controversial conditions or not, and my discussion suggest that the number of controversial features of their theories requiring convergence of reason may be difficult to square with the high level of pluralism in modern societies.

Despite their differences, all three theorists discussed in this chapter endorse the principle of liberal legitimacy. The principle of liberal legitimacy is put under strong pressure when applied to highly diverse societies as the range of beliefs asking for accommodation often conflict and make justifiability to all reasonable citizens possible. The difficulty liberal political theories face is that both an overly weak and an overly strong notion of reason undermines the ideal of a political order justifiable to all. Politics as coordination undermines this ideal by focusing too much on the gains from social cooperation, and consensus theorists undermine the same ideal from the opposite direction by being too demanding of their citizens. A third insight to be highlighted from the discussion in this chapter is that a plausible liberal theory is therefore bound to be within these bounds; neither too weak nor too strong.

It might be argued that reaching an equilibrium along these lines is impossible, but this is the aim liberals have set themselves when acknowledging both the principle of liberal legitimacy and the need to accommodate diversity. All three theorists discussed in this chapter can be taken as attempting to offer answers to the dilemma of how the conflict between the weak and strong elements of contemporary theories of liberalism can be resolved. Despite the fact that my discussion pushed Waldron towards Reformation liberalism, and Habermas and Rawls closer to Enlightenment liberalism, neither of these two categories fit the examined theories very well. Those

who invoke this distinction by denouncing Enlightenment liberalism and emphasising how Reformation liberalism can accommodate diversity give a false impression of how diversity can be accommodated. Therefore, a fourth important insight from this chapter is that the examination of these theorists throws doubt upon the usefulness of a hard and fast distinction between Reformation and Enlightenment liberalism. The discussion in this chapter has pointed out the complexity associated with accommodating diversity and to suggest a quick fix through Reformation liberalism is simply to underestimate the difficulty that lies in fulfilling the promise of the liberal principle of legitimacy.

The solution is not a wholesale rejection of Enlightenment liberalism and a wholehearted embrace of Reformation liberalism. Instead, a solution must follow along the lines of the dilemma formulated above. The equilibrium is reached when the political order effectively blocks threat advantage and unlimited political power without relying on consensus across a wide range of controversial topics. Avoiding these two pitfalls guards against a wide range of oppressive practices. Furthermore, rejecting a strong consensus takes properly into account how deeply many disagreements run in politics and relies on the idea that politics is essentially about disagreement, rather than agreement. Saying that politics is essentially about disagreement rather than agreement does not exclude the possibility of reaching agreement on some issues. It is only that many political disagreements are extremely difficult given that questions of justice reflect disagreements over deeply held convictions and people's livelihood. These and many other issues are issues where people disagree and they constitute an important part of what politics is all about (although it is not exclusively about these issues).

## **5. Concluding Remarks**

Enlightenment liberalism has been blamed for liberalism's assumed inability to accommodate diversity because it controversially presupposes convergence of reason on a wide range of ideas. As a reaction against the supposed failure of Enlightenment liberalism, Reformation liberalism is held up by many liberal theorists as the proper response to the challenges from diversity and pluralism. Politics as coordination might be interpreted as an attempt to answer the challenges posed by diversity and pluralism in the spirit of the Reformation. However, we found that this approach has two serious drawbacks that fail to satisfy the liberal principle of legitimacy. The discussion of

Habermas and Rawls pointed towards two more promising ways to accommodate diversity and pluralism, but in the end, both include substantive, controversial elements in their theories in ways that threaten to undermine their attempts to accommodate diversity.

The discussion of these three alternatives reveals the dilemma for liberal constitutionalist theories. Given their embracing of the principle of liberal legitimacy it becomes increasingly difficult to accommodate diversity and pluralism. Liberal theorists' endeavours become either too weak (as in the case of Waldron) or too strong (as in the cases of Habermas and Rawls). Furthermore, this points out that liberalism is bound to be based on convergence on some basic tenets, otherwise the political order will cease to be a liberal one, but it cannot be too strong without unjustly excluding some reasonable citizens. The task is to find a balance between these competing demands. Hence, to talk of a stark distinction between Reformation and Enlightenment liberalism only serves to divert attention away from how this task can be accomplished. The distinction between Reformation and Enlightenment liberalism thus poses a false distinction and promises a quick fix to the challenge of diversity and pluralism that is not viable. Instead, we have seen that it is necessary to base a legitimate political order on some convergence, but that does not mean a version of Enlightenment liberalism equivalent to Kant's or Mill's perfectionist liberalisms.

The next chapter will outline the structure of a theory aiming to balance these competing demands in a way that is stronger than the politics as coordination, but at the same time weaker than politics as consensus. If this alternative succeeds, it means that it is possible to arrive at a plausible understanding of reason, and a plausible liberal constitutionalist model sensitive to the demands of both liberal legitimacy and pluralism.

## CHAPTER THREE

### The Impartial Alternative

*Socrates: What subject of difference would make us angry and hostile to each other if we were unable to come to a decision? Perhaps you do not have an answer ready, but examine as I tell you whether these subjects are the just and the unjust, the beautiful and the ugly, the good and the bad. Are these not the subjects of difference about which, when we are unable to come to a satisfactory decision, you and I and other men become hostile to each other whenever we do?*

*Euthyphro: That is the difference, Socrates, about those subjects.*

Socrates<sup>7</sup>

If such influential theories as Waldron's Hobbesian theory, Rawls's political liberalism and Habermas's communicative and discursive theory fail to provide an ideal framework for creating a workable political order one might think that no other alternative exists for creating a liberal constitutionalist political order. Given the competing demands of liberal legitimacy and pluralism, the task is simply too hard. Before drawing that conclusion, however, there are reasons to explore one more possibility: the contractual framework developed by T. M. Scanlon and Brian Barry. The attractiveness of this theoretical framework is that it is based on impartial and equal constraints that seem to fit well with liberal legitimacy. In addition, this framework acknowledges the significance of pluralism and relies on weaker assumptions than politics as consensus. Scanlonian/Barryian contractualism thus appears as a middle way between politics as coordination and consensus, and if this impression can be sustained it offers a promising framework for determining the role of reason in liberal constitutional theory.

This alternative has two fundamental building blocks, the contractual theory developed by Scanlon, and Barry's development of this contractual framework into a theory called justice as impartiality. This chapter aims to outline these two basic building blocks in sections one and two. Then, section three will discuss some of the political implications of justice as impartiality. Although this theory is a promising

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<sup>7</sup> *Complete works of Plato*, p. 7

alternative to the theories discussed in the previous chapter the main conclusion of my analysis is that the theory shares some of the same problems as the consensus focused theories of Rawls and Habermas. Justice as impartiality appears to rely on a narrow and strict understanding of reason that is difficult to square with pluralism. For example, the theory seems to be insensitive to many demands of cultural and religious accommodation. Furthermore, the political implications seem detailed and wide ranging. For example, the strong notion of equality of opportunity defended by Barry suggests a limited role for democratic decision-making. Both these implications, if they reflect accurately the commitments of the theory, threaten the plausibility of contractualism to provide an alternative to the theories already discussed. Because justice as impartiality shares some of the problems associated with consensus theories, the liberal constitutionalist promise of justice and democracy seems unrealistic, as none of the potential theoretical frameworks seems to withstand scrutiny. Socrates therefore seems to have been right when he pointed out that questions of justice are subject to disagreement and even hostility. Despite this discouraging conclusion, towards the end of the chapter I will point out the possibility of re-interpreting some of the controversial tenets to find a possible way forward in building a foundation for a liberal constitutional political order.

### **1. The Structure of Justice as Impartiality**

It is natural to start an analysis of the structure of justice as impartiality with the fundamentals of Scanlonian contractualism because justice as impartiality is built around important aspects of Scanlon's account. Scanlon's theory is based on the concept of 'reasonable rejectability'. However, it is open to question what exactly this means. This difficulty arises because although it is relatively clear what reasonableness means in a discussion of abstract and general principles, as soon as the discussion focuses on more concrete examples of what the abstract principles actually require things become far from clear. Given the centrality of the term 'reasonable', and given its importance for understanding what justice requires, it will be an important focus of discussion in this chapter.

Contractualism, according to Scanlon, is concerned with moral wrongness in general and not specifically with justice, and the general formulation states that: 'An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably

reject as a basis for informed, unforced general agreement' (Scanlon: 1982: 119). To see exactly what it means for a principle to be reasonably rejectable several of the terms mentioned in this statement need further explanation.

First, the term 'reasonable' aims to 'exclude rejections that would be unreasonable given the aim of finding principles which could be the basis of informed, unforced general agreement. Given this aim, it would be unreasonable, for example, to reject a principle because it imposed a burden on you when every alternative principle would impose much greater burdens on others' (Scanlon: 1982: 111). This statement relies on the view that everyone shares the same interest in reaching an agreement given equal concern for everyone's interests. It is only in the hypothetical contract situation that it is required that everyone shares this motivation for agreement. In real life, it is not required. In other words, in real life the parties are free to pursue their self-interest and their own conceptions of the good (but they must be motivated by a desire to be able to justify their actions to similarly motivated others),<sup>8</sup> and they must accept constraints on their self-interest and on the pursuit of their conception of the good. This underlines the fact that the term 'reasonably rejectable' is primarily directed towards the hypothetical original position, and that the social contract requires hypothetical consent and not actual consent.

An 'informed' agreement 'exclude(s) agreement based on superstition or false belief about the consequences of actions, even if these beliefs are ones which it would be reasonable for the person in question to have' (Scanlon: 1982: 111). A weakness with this formulation is that it does not say what informed agreement is, just what an informed agreement cannot be. Furthermore, Scanlon says no more about the nature of superstition and false beliefs. Often the central disagreement between, say rival conceptions of the good is over exactly what constitutes superstition or false beliefs. Just to take a simple example, Christians and Atheists will disagree strongly over what constitutes superstition and false beliefs. Christians will argue that to claim that God exists does not constitute superstition or a false belief. Atheists will disagree with this statement and argue that it certainly constitutes superstition and a false belief. Even if science is taken as a basis for what can be constituted as 'informed' it is still of limited

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<sup>8</sup> In the 1982 article first outlining Scanlon's contractual theory, a desire to justify one's actions to others forms the foundation of the theory. In *What We Owe to Each Other* (1998) 'desire' is replaced with 'reasons' to justify one's actions to others. This is a notable change of emphasis, but I believe that this change does not affect the argument of this thesis (or have any bearing on the use of Scanlonian contractualism in political philosophy more generally).



use in deciding conflicts of interests between groups. Disputes over, for example, distributive justice or freedom of religion cannot easily be settled by science, as science does not provide straightforward answers to resolve such disagreements. It is therefore unclear what ‘informed’ agreement actually involves.

The lack of clarity is re-enforced by the fact that the ‘informed’ condition also excludes false beliefs and superstition that it is reasonable for a person to have. This moves the understanding of the condition in the direction of understanding ‘informed’ as an expression capturing the idea of an objective moral truth that can be acknowledged by all moral actors. These truths are not explicitly stated, but affect which outcomes can be counted as reasonable. Regardless of how one decides to interpret this term, it stands out as one of the most difficult terms to grasp in this theory. I will discuss this term in more detail when discussing Barry’s adaptation of Scanlon’s theory in developing his own theory of justice.

A problem with this formulation is that it does not say what informed agreement is, just what an informed agreement cannot be. Furthermore, Scanlon says no more about the nature of superstition and false beliefs. Often the central disagreement between, say, rival conceptions of the good is over exactly what constitutes superstition or false belief. Just to take a simple example, Christians and Atheists will disagree over what constitutes superstition and false beliefs. Christians will argue that the claim that God exists is not a superstition or a false belief. Atheists will disagree and argue that such a claim is a ‘superstition’ and is certainly false. Even if science is taken as a basis for what can be constituted as ‘informed’ it is still of limited use in deciding conflicts of interests between groups. Disputes over, for example, distributive justice or freedom of religion cannot easily be settled by science, as science does not provide straightforward answers to resolve such disagreements. It is therefore unclear what ‘informed’ agreement actually involves.

To say that an agreement is ‘unforced’ simply means that neither coercion nor ‘being forced to accept an agreement by being in a weak bargaining position’ are permitted to influence the outcome (Scanlon: 1982: 111). The unreasonableness of unequal bargaining power played an important role in rejecting politics as coordination in the previous chapter, and it has strong intuitive appeal to hold that being forced to accept an agreement is something very few would accept as fair or reasonable. In addition, a principle that cannot be reasonably rejected must be an impartial principle. Impartiality is defined by Scanlon as limiting principles that

cannot be reasonably rejected to those ‘which it would be rational to accept if you did not know which person’s position you occupied and believed that you had an equal chance of being in any of these positions’ (Scanlon: 1982: 120). The important point is to give equal weight to the contracting parties’ concerns.

This leads to another feature of this understanding of contractualism - namely that ‘when we consider a principle our attention is naturally directed to those who would do worst under it. This is because if anyone has reasonable grounds for objecting to the principle it is *likely* to be them’ (Scanlon: 1982: 123, original emphasis). Hence, one of the concerns of contract theory is to provide sufficient protection for the interests of the weakest groups in society.

As we have seen, the scope of Scanlon’s theory is moral wrongness in general and although justice is concerned with what is right and wrong, the scope of justice is narrower. Essentially, a theory of moral wrongness is concerned with the question of what is right or wrong in general, while justice is focused on a subquestion of morality and social justice; more precisely on the question: ‘how are we to live *together*, given that we have different ideas about how to live?’ (Barry: 1995: 77, original emphasis).<sup>9</sup> To suit this different purpose Scanlon’s theory must be adapted in several ways and I will now go on to discuss how justice as impartiality is built around Scanlon’s contractualism.

Again, what is meant by ‘informed’ must be unpacked in order to see more clearly what reasonableness means in justice as impartiality. ‘Informed agreement’ on Scanlon’s definition means that an agreement should not be based on superstitions or wrong beliefs. Barry acknowledges that the trouble with this is that ‘one person’s superstition is another’s belief’ (Barry: 1995: 69). Given that the purpose of justice as impartiality is to reach an answer to the question of how people with different ideas about how to live can still live together it is not necessary to consider how superstition can be distinguished from the truth. Instead, Barry says, justice requires ‘that they [the parties] know the bare facts about their society but also that they know that other societies do things differently and that their own could feasibly be different in various ways’ (Barry: 1995: 107). The crucial element is that justice as impartiality does not take a position on whether one religious faith or another is superstitious. Taking a position on this issue would violate the commitment to impartiality between different

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<sup>9</sup> See definition of justice on page 34 for a more detailed account of the scope of justice.

conceptions of the good. Furthermore, being informed to make political decisions does not require an answer to this issue. Making political decisions requires only knowledge about one's own and other societies not knowledge about what constitute superstitious and false beliefs.

Given that it is likely that people will disagree both over what constitute superstitious and false beliefs and over other political issues, an important goal of justice as impartiality is to prescribe a fair procedure for making decisions. 'If freedom to worship in the way you think right is of great importance to your own ability to live what you regard as a good life, then you are asked to accept that it is important to others too' (Barry: 1995: 84). Instead of taking a position on the issue of what constitute false and superstitious beliefs justice as impartiality asks us to accept the idea of equal rights to things such as freedom of religion. Emphasizing equal rights to worship makes references to false and superstitious beliefs irrelevant, because the theory does not need to discriminate between beliefs on grounds of their truth value.

To understand what difference Barry's rejection of a strong understanding of the 'informed' condition, consider, for example, a society dominated by a group of Atheists and a group of Christians. As a matter of fact, one of these groups must be wrong. The beliefs of the mistaken group are false. On Scanlon's account, this group would not be 'informed' and thus not fully reasonable. Instead of adopting this position, Barry holds that it is precisely the question concerning which group is right or wrong that is disputed. Furthermore, this question cannot be conclusively answered. Consequently, Barry accepts that those who for example hold a conception of the good like Christianity can count as reasonable and informed. Barry is thus more inclusive than Scanlon in accepting a wider range of reasons as legitimate.

Furthermore, Barry makes two other important adaptations of the Scanlonian understanding of informed agreement and reasonableness. The first is that citizens are expected to have knowledge of their own society and alternative societies and they are expected to be able to understand and evaluate the implications of policy proposals by political parties (Barry: 1995: 107-108). Given that modern societies are increasingly complex and that evaluation of policies is difficult even for experts on specific subjects, this requirement must be understood in a relatively weak way; there is a limit to the extent to which one can expect citizens to grasp detailed policy proposals. Nevertheless, despite the growing complexity of modern societies, it is still

meaningful to say that it is plausible to require a general knowledge of policies and their intended consequences.

Even if people are informed in the way stipulated above, it is still possible that they will disagree over what is reasonable. It is when such issues arise ‘proceduralism has a part to play’ (Barry: 1995: 69). What Barry has in mind here is that ‘legislation, for example, should be based upon consultation, in the course of which concerned individuals and organizations are given enough time to formulate comments on proposals; there should be hearings, where experts and others with something to contribute to a process of rational evaluation have a chance to state their case and answer questions’ (Barry: 1995: 103). The idea here is a process marked by impartial procedures giving the appropriate chance to everyone concerned to express their views on the suggested legislation. To an extent, this resembles the actual process of law-making, although in this wording it is of course more idealized than current practices in most democracies. It is important to notice that democratic decision-making is assigned an important role in determining the outcomes of questions of social justice. The thought behind all this is that it is reasonable for people to disagree about issues of social justice and the best way to resolve such disputes is through democratic decision-making marked by impartial procedures. People who disagree with the outcomes are more likely to accept the outcomes if the process leading up to the decision was fair and impartial and if they had an equal chance to express their views (Barry: 1995: 150).

There is a second element to what it means to be reasonable and this is perhaps the most important one: ‘the willingness to accept reasonable objections to a proposal regardless of the quarter from which they come’ (Barry: 1995: 100). Essentially this means being able to see things from the perspective of others, and acknowledging that others’ reasons are as important as one’s own. This does not mean that one also has to attach the same evaluative status to everyone’s opinions after considering their merits and weaknesses, but only that one must have a fundamental willingness to try to see things from the perspective of others. Exactly what this requires is perhaps impossible to define precisely but an example of what this might involve in practice is to respect the authority of democracy, as far as the democratic process follows fair and impartial procedures. Reasonableness then requires a democratic culture where the value of democratic decision-making is widely appreciated. To think of reasonableness in

terms of impartial procedures and deliberative practices is an attempt to construct a practical and workable approximation of a highly abstract and theoretical notion.

We can now see that justice as impartiality's account of 'informed' differs from Scanlon's in two main ways. Firstly, justice as impartiality does not aim to assess the truth claims underlying different conceptions of the good. Instead, the idea is to find principles for how to avoid conflicts based on competing conceptions of the good and the distribution of scarce resources. Secondly, what is crucial is that agents ought to be motivated to find terms to live together even if they strongly disagree about how one should live. A central element in contractualism is to be able to see the importance of putting oneself in the situation of others and granting them the same rights and advantages as one wants for oneself. The basic requirement for being an informed citizen in this sense is to be able to comprehend policies proposed by different parties and their implications, and to have a basic knowledge of one's society and of alternative societies.

Although these notions of what it is to be informed and what it is to be reasonable appear plausible, each is highly contentious in contemporary political philosophy. The problem is twofold. First, it is unclear what exactly it means to be reasonable in many situations. Secondly and related, the term 'reasonable' is part of the machinery that is doing the real philosophical work in the argument as a principle's justifiability effectively rest on its being reasonable or not. Hence, it becomes tremendously important to know more precisely what this term means. However, the problem is that if one cannot arrive at a precise meaning of the term then it seems difficult to assign such importance to it. Relying on a concept that is hard to define and that is doing an important job in the theory seems to point towards a weakness in contractualism.

Regarding these points, it can be said that someone who never attaches any weight to reasons given by, for example, women because he thinks women are naturally inferior to men, may easily be labelled as unreasonable for not acknowledging the equal moral status of men and women. However, it is a lot more complicated to discern what it means to be reasonable when the question is not whether men and women have equal moral status or not but, for example, whether treating women as equal to men involves schemes like special representation of women in parliament. The difficulty here is that one might acknowledge that there are reasonable arguments on both sides of this issue. Hence, it is not obvious that in cases

where women are not granted special representation, this is a clear case of an injustice. Therefore, it is difficult to attach such strong weight to what counts as reasonable, because what counts as reasonable is elusive as soon as one moves from abstract principles to political requirements in actual societies. That is unless the term can be given clearer content.

In an attempt to overcome this difficulty, Barry develops two approaches to judge what can reasonably be rejected. The first is an *a priori* approach which asserts that many unjust schemes can be detected by starting from the Scanlonian original position and asking ‘whether there are things that nobody would reasonably accept in the absence of coercion, including the implicit coercion of nonagreement outcome...Examples that spring to mind immediately are slavery, apartheid, and genocide’ (Barry: 1989: 347). These schemes are ruled out as those who will do badly under them have a strong - and reasonable - interest in rejecting them. This approach relies only on reason, and does not in any way rely on empirical considerations and is in this sense *a priori*.

By contrast, to derive more determinate answers to more detailed questions of justice one needs to consider to what extent a principle or a policy recommendation is suggested by the ‘circumstances of impartiality’. The ‘circumstances of impartiality’ are defined ‘as the conditions under which the substantive rules of justice of a society will tend actually to be just’ (Barry: 1995: 100). This requires that one investigate the empirical evidence. For example, Barry writes, that a society in which

each section of the population has its own organizations and organs of communication to articulate its interests and aspirations is closer to the circumstances of impartiality than one in which, say business is well organized but labor is not, and in which almost all the organs of mass communication are owned and controlled by the rich. Similarly, a political system in which parties represent the distinctive interests and aspirations of different groups is closer to the circumstances of impartiality than one in which all successful candidates have either to have money or to be acceptable to those who have it.

(Barry: 1989: 347)

The extent of impartiality and equality found in these circumstances provides an answer to how just a given society is.

This second approach is not concerned with deriving abstract principles, but is concerned with how the abstract principles derived by the *a priori* approach fare in

actual societies. The central thought is to investigate to what extent the institutions of actual societies can be said to express the ideals of these abstract *a priori* principles. This is necessary in order to say something more determinate than just that slavery is unjust. Barry calls this second approach the ‘empirical method’ (Barry: 1989: 347), and it is a departure from the original Scanlonian contractualism which simply relied on what could be derived directly from the hypothetical contract situation based on reason. The empirical method has two important features. First, it is based on empirical evidence. Moral truths and unjust/just schemes are based on how impartiality fares in specific societal contexts. It proposes that it is possible to say something accurate about justice. This leads to the second feature: it provides substantive answers to questions of justice. By applying the empirical method, the idea one arrives at determines answers about the just distribution of rights and economic resources. Thus, if the empirical method works, this approach will, to a large extent, determine what is just or unjust.

However, invoking the empirical approach does not clarify the meaning of reasonableness. For Barry, the empirical method seeks to identify to what extent the actual institutions and workings of a society are impartial. It is precisely in such an enterprise that it becomes difficult to assign a precise meaning to what justice requires because it is not entirely clear that it is possible to identify how impartiality in, for example, the relations between employers and employees actually ought to be conceptualized. As we have seen, it is unreasonable to claim that women are inferior to men, but it is not clearly unreasonable to claim that treatment as equals does not involve special representation in parliament. Similarly, it is unreasonable to argue in favour of a general principle giving employers exclusive rights to determine the relationship between employers and employees, but it is not clear that impartiality necessarily requires strong unions (although, it often seems plausible) to create a balance between the two parties. The important point here of course is not whether or not unions are required to level the playing field between labour and capital, but rather to note that the claim that justice requires unions or special representation for women relies on substantive arguments and is not something which can be decided *a priori* through abstract reasoning in the Scanlonian original position. The empirical method is therefore bound to rely on a wide range of controversial empirical and substantive arguments.

For justice as impartiality to derive clear and unambiguous answers to the questions Barry asks in the quote above a precise meaning must be attached to what is meant by reasonableness. The two examples above show that it is relatively clear what reasonableness means at an abstract and general level, but as soon as one asks what it means in particular and practical cases it is unclear, and it may be possible to find reasons on both sides of the issue that appear reasonable. What justice requires, therefore, seems to be relatively clear in the abstract, but as soon as one moves to actual and particular cases it soon becomes blurred and unclear.

This difficulty is not only present in justice as impartiality, but is also found in contemporary Anglo-American political philosophy more generally. Some of the most important disagreements between liberal political philosophers concern not whether justice requires the protection of certain rights and a democratic political order, but exactly what rights and what kind of democratic order. Many of the important debates are about such issues as whether equal treatment of women and religion involves banning headscarves in schools and the use of religious symbols in public. The disagreement is over what is reasonable in this particular case, not whether women and religions ought to be treated as equals and impartially.

The same applies to a wide range of other issues, too. Does impartial and equal treatment of ethnic minorities require that we assign them group specific rights and special representation in parliament? This is how the discussion goes on in many issues related to social justice and multiculturalism. The crucial issue in many of these debates is what justice requires, rather than what justice *is*. Since so many of the important debates are precisely about what justice requires, it is important to the analysis of the relationship between general and abstract principles and practical and particular cases to see how the general and abstract informs the particular and how we move from one level to the other.

A second question this issue raises is over the scope of justice. Barry's distinction between the *a priori* and the empirical method puts stress on exactly this ambiguity in political philosophy and that is what makes his theory of justice an interesting starting point to explore this issue in detail. It is important to acknowledge that this philosophical ambiguity is not the only element that needs to be explored when analysing what justice requires. Another, and equally important element, is the political implications of the theory. That is to ask what kind of political structures are required by justice. This question is important in determining the scope of justice and



also in ascertaining what kind of institutions justice requires and how these institutions ought to work. Along similar lines to the ambiguity discussed above, the idea that justice requires a democratic order is not controversial, but exactly what type of democracy and what justice requires of democracy are questions that are as disputed as is the question of what justice requires in terms of public policies. Examples of such disputed issues are debates about whether democracy ought to be organized around deliberative practices and models of democracy where participation and consensus play an important role, or whether democracy ought to emphasize procedures and majority rule. To explore the scope of justice and its political implications, it is important to start with an analysis of what justice requires. The next section starts this exploration by outlining what justice as impartiality seems to require.

## **2. Two Requirements of Justice as Impartiality**

The previous section pointed out the intimate relationship between Scanlon's contractualism and justice as impartiality. Scanlon's theory can in many ways be said to be made less demanding by Barry's adaptations. We saw especially that this was the case with the understanding of reasonableness. Furthermore, the aim of Scanlon's theory was moral wrongness in general, while justice as impartiality aims to address the issue of how peaceful co-existence is possible given widespread disagreement over how to live. This is the purpose of the theory, but still we saw that the distinction between the *a priori* and the empirical approach created two ambiguities in establishing what peaceful co-existence would entail. The first ambiguity was how to connect the *a priori* and the empirical approach. The second ambiguity was concerned with the scope of justice. Given these ambiguities, the aim of this section is to examine in more detail what justice as impartiality requires.

I will argue in this section that a liberal theory of justice - like justice as impartiality - has two main requirements. The first is that it requires a democratic order. This is clear from the emphasis on proceduralism, and the importance attached to the requirement that a political order be justifiable to everyone. The second requirement is that justice as impartiality demands that the basic rights of each person are protected through a system of fundamental rights. Furthermore, these two requirements are closely linked to the scope of justice and the notion of impartiality underlying justice as impartiality. A second aim of this section is to tie the two

requirements to the crucial distinction in justice as impartiality between first-order and second-order impartiality and the scope of justice.

I begin with the scope of justice, which, Barry says, ‘do[es] not apply to all political questions but only to those involving what we may call “constitutional essentials”’ (Barry: 1995: 144). Constitutional essentials are meant to secure a person’s basic rights and liberties. What is outside the scope of justice as impartiality are ‘much tax legislation and many laws regulating property; statutes protecting the environment and controlling pollution; establishing national parks and preserving wilderness areas and animal and plant species; and laying aside funds for museums and the arts’ (Barry: 1995 144).<sup>10</sup> Although these issues are outside the scope of justice that does not mean a theory cannot say anything about them. Instead, what it means is that on these issues there is a range of possible outcomes consistent with justice and that justice as impartiality does not prescribe particular outcomes (although it would proscribe those outcomes that are outside the range permitted by the theory). It is difficult to define this range in detail, but an important task of this thesis is to suggest some indicative boundaries. (Chapter four offers a framework for understanding the role of reason and Chapter seven discusses some implications regarding social justice and the role of group rights). Barry holds that the typical rules and principles laid down in a constitution include

agreement on the desirability of the usual guarantees against detention without trial, torture of suspects, and so on. Constitutions also need to lay down the basic rules defining the workings of the political system so as to remove them from the reach of governments and legislative majorities, which have an obvious interest in manipulating the rules in order to perpetuate their own tenure. Freedom of speech and freedom of political organization are also best thought of as an aspect of a satisfactory political decision-making process.

(Barry: 1995: 85)

In these quotations, we see that justice covers only a limited number of questions and is restricted to securing basic rights and describing the workings of the political system. Other issues are left to ordinary politics. However, the constitution also puts limits on legislative bodies and majorities who might have an interest in manipulating the political process. Thus, the scope of justice as impartiality is restricted to

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<sup>10</sup> Barry follows here the same distinction as made by John Rawls in *Political Liberalism*, p. 214.

‘constitutional essentials’ securing basic rights and restricting majority-rule. In addition, this scope is restricted to only a few issues; all other issues are open to the ordinary course of politics. Given the emphasis in the previous section on deliberation and proceduralism we also see that democracy is given an important role in the theory.

One way in which democracy is constrained is through judicial review.<sup>11</sup> This means that the democratic process does not rely only on majority-rule, but is supplemented with procedures or institutions that aim to protect fundamental rights such as freedom of religion. Following this, the role of the constitution is to ‘set out some constraints on the operation of the legal system and ... lay down the fundamentals of the political system’ (Barry: 1995: 94). This means that the scope of justice is restricted to such constitutional essentials while other issues are primarily questions of ordinary politics rather than questions of justice.

Regarding the status of the abstract principles of social justice, it is clear that these are not constitutional essentials and cannot be subject to judicial review because

courts are wholly unsuited for the kinds of judgement that are needed. For what is at stake in any given society includes (to mention only some of the most obvious) the form of economic organization (private ownership, public ownership, workers’ cooperatives, and so on), the system of taxes on income, inheritance and gifts, and the basis on which cash transfers are made. These are, if anything is, the stuff of politics.

(Barry: 1995: 95)

The important point to note here is that questions not suitable for judicial review are those concerning ‘the overall level of expenditure and the general organization of the service’. These issues ‘are more suited to the government and legislature, even when they too involve questions of justice’ (Barry: 1995: 98). Judicial review has a role to play concerning how ‘principles such as non-discrimination, equal educational opportunity and equal access to health care’ are implemented (Barry: 1995: 98). Thus, for justice as impartiality it is acceptable that ‘the French choose to fund children heavily and pensioners less generously while the Germans have very generous pensions but less generous child benefits’ (Barry: 1995: 97). We see from this that

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<sup>11</sup> I will here and throughout this thesis understand judicial review in a wide and non-technical way by referring to judicial review merely as a practice where the judiciary interprets the law in accordance with the constitution (and can thus strike down laws that are unconstitutional).

justice as impartiality allocates a limited (but important) role to the judiciary, and leaves wide scope for societies to decide many issues regarding justice through democratic decision-making.

Not all democratic theorists share this less comprehensive view. Some argue instead that justice not only requires social and welfare rights to be included in the constitution, but also that democracy requires this. A notable example is the recent democratic contractualism proposed by Corey Brettschneider in which the claim is made that democracy requires that all citizens 'are entitled to have their basic needs met' (2007: 130). This gives rise to welfare rights such as a right to a job, universal basic income and a right to in-kind resources to cover basic needs (Brettschneider: 2007: 128). Justice as impartiality resists this move for the reasons given above. These issues are the 'stuff of politics', and thus the stuff of democracy.

Nonetheless, even if justice as impartiality only seeks to constitutionalize fundamental rights, and not social rights, this is still contentious. Many democratic theorists hold that invoking fundamental rights outside the reach of democracy denigrates the idea of democracy itself. Robert A. Dahl, for example, argues that introducing a set of fundamental rights outside the reach of politics is essentially guardianship and rule by the wise, which undermines the idea of democracy itself (1989: 163-175). Similar thoughts enjoy a prominent role in the works of a wide range of other influential democratic theorists like Jeremy Waldron (1999), John Dryzek (2000), and Amy Gutmann and Dennis Thompson (1996) (among others).

Another version of this criticism is to reject a strong legal constitution based on judicial review and instead emphasize a political constitution (Bellamy: 2007). This approach is more in line with the accounts given by the democratic theorists mentioned above. It takes seriously the challenges posed by unrestricted majority rule and argues that judicial review instead of supporting democracy undermines democracy. The solution is to strengthen the institutions and the workings of the democratic system instead of resorting to extra-democratic schemes such as judicial review. The tension these theorists see with fundamental rights outside the reach of politics is that such rights are ones on which the people have not had the chance to vote, or to decide whether they think the political system ought to include them.

This, the critics argue, undermines democracy because it denigrates the idea of the people as sovereign. Given the importance of a legitimate political order justifiable to everyone, for liberals this criticism, if correct, has devastating implications for the

idea of fundamental rights. Not only does it put pressure on the plausibility of a liberal constitutionalist order, but it also puts pressure on the relationship between justice and democracy. There seems to be a deep tension between the idea of justice understood as a set of fundamental rights and a democratic order based on the idea of the people as a legitimate source of political authority. This is a much debated and notorious tension between liberal constitutionalists and democratic theorists, and I will pursue this debate in greater detail in Chapter six.

So far in this section, I have pointed out that justice as impartiality emphasizes basic individual rights such as freedom of religion, the integrity of the person and equal political rights within a democratic context. In addition, democracy is allocated an important role in that most issues, apart from the constitutional essentials, are within the scope of politics rather than the scope of justice. Thus, the scope of justice seems to be limited, while the scope of politics remains relatively wide. In the remaining part of this section, I will discuss in more detail how one can distinguish between questions that belong primarily within the scope of justice and questions that belong primarily to the realm of politics.

An important distinction in this respect is between first-order and second-order impartiality. It is important to discuss this distinction as it cuts across the fierce debate between partialists and impartialists that has been central to much recent moral theory.<sup>12</sup> Two of the central questions in this debate have been: 1) whether impartiality has implausible consequences, i.e., demands impartiality in all situations by individuals, and 2) whether impartiality makes personal relations difficult, i.e., by requiring us to treat strangers and friends on the same terms (Becker: 1991). If justice as impartiality demands impartiality in all situations and requires that strangers ought to be treated on the same terms as friends, the theory seems to have implausible and intrusive implications. First-order impartiality is interpreted to require that faced with the choice between saving one's wife or the archbishop of Cambray from a burning house, impartiality requires one to consider who to save impartially and not take into consideration that one of the persons happens to be one's wife (Godwin: 1985). However, I believe that the distinction between first-order and second-order impartiality can show that such implications do not follow from this theory:

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<sup>12</sup> See the following for some important contributions to this debate: Baron (1991), Deigh (1991), Friedman (1989), Kekes (1981), Mendus (2002).

What the theory of justice as impartiality calls for are principles and rules that are capable of forming the basis of free agreement on reasonable terms. If we call impartiality in this context second-order impartiality, we can contrast it with first-order impartiality, which is a requirement of impartial behaviour incorporated into a precept. Roughly speaking, behaving impartially here means not being motivated by private considerations. This is often cashed out by claiming that to be impartial you must not do to one person what you would not do for anybody else in a similar situation. Where your being a friend or relative of one but not the other is excluded from counting as a relevant difference.

(Barry: 1995: 11)

This distinction is important for several reasons. First, the aim of justice as impartiality is the justification of political institutions, not the justification of individual action. The tenets of the theory apply to the institutions of government and the officials representing it. They do not apply to all individual actions, but leave a wide scope for individual discretion. If the theory prescribed a certain conduct for persons in every situation, the theory would itself be a conception of the good and hence not impartial. To ensure that people have adequate ability to pursue their own conceptions of the good, and because the scope of justice is restricted to constitutional essentials, justice does not require strict first-order impartiality. It is mainly in relation to issues of public concern that strict impartiality is required. This means, for example, that different religions ought to be treated on equal terms and receive the same benefits and obligations and that important government contracts ought not to be awarded on the basis of religious or ethnic affiliation.

Even if it is not clear from the brief outline of this distinction exactly how justice as impartiality draws the line between first-order and second-order impartiality, it is clear that the scope of first-order impartiality is limited and does not set out a moral ideal covering a wide range of issues and aspects of one's life. The burden of first-order impartiality is mainly an institutional burden and a burden for those individuals occupying public roles within the institutional framework of public institutions. It is not a moral ideal for individuals regulating most or all aspects of their lives. The distinction between first- and second-order impartiality tries to define a framework in which individuals and groups of individuals can realize their moral ideals without being unfairly advantaged or disadvantaged.

In fact, justice as impartiality firmly rejects the idea of basing public policy or public institutions on a moral ideal (apart from a strict ideal of impartiality between conceptions of the good). Indeed, this limited understanding of the range of first-order impartiality differentiates justice as impartiality from other versions of liberalism. Some liberals (such as, for example, Will Kymlicka (1989), Joseph Raz (1986) and Bruce Ackermann (1980)) have argued that the foundational value of liberalism is an ideal of moral autonomy. Autonomy constituted, for example, an important part of John Stuart Mill's liberalism, and Mill stressed the importance of promoting individuality (autonomy), which he understood as the individual's ability to engage in independent thinking and self-determination over his or her own life. This belief informed both *The Subjection of Women* and *On Liberty*. Perhaps the most prominent liberal proponent of autonomy in contemporary political philosophy is Joseph Raz, who explicitly acknowledges his debt to Mill (Raz: 1986: 367-373). Liberalism based on autonomy is often called perfectionistic because it upholds certain moral ideals and argues in favour of the realization of personal autonomy for individuals. This ideal is not impartial between autonomy and non-autonomous conceptions of the good and violates the idea of impartiality. A controversial feature of autonomy as a moral ideal is that

a conception of the good as autonomy does not imply that the pursuit of all substantive conceptions of the good is equally valuable. Only those conceptions that have the right origins – those that have come about in ways that meet the criteria for self-determined belief – can form a basis for activity that has value. It is therefore unlikely that the good as autonomy will be advanced by distributing resources in a way that takes no account of the autonomous or non-autonomous origins of people's substantive conceptions of the good.

(Barry: 1995: 131-132)

Instead, justice as impartiality has a more restrictive view of autonomy: 'all that the theory of justice as impartiality insists on is that the decision should be the outcome of a fair political process. There is thus nothing built into justice as impartiality that leads to its endorsing policy prescriptions derived from a conception of the good as autonomy. It is procedurally neutral' (Barry: 1995: 132). This underlines how the procedural aspects of justice as impartiality aim to be neutral between different

conceptions of the good, and notice here that what Barry has in mind is the idea of autonomy as a moral ideal. An autonomy based version of liberalism would restrict the scope of acceptable outcomes to those encouraging autonomy. This contrast shows that the scope of first-order impartiality in justice as impartiality imposes weaker restrictions on acceptable outcomes than are imposed by other versions of liberalism.

Despite the controversial role of autonomy in liberalism, it has played a foundational role in some recent theories of democracy. For example, Robert E. Goodin who ‘presupposes individuals who are autonomous’ and claims that democracy on his view ‘is essentially a matter of treating those autonomous individuals with equal consideration and respect’ (2003: 23). Another example is Thomas Christiano’s highly egalitarian theory, which is strongly in the spirit of John Stuart Mill. With reference to Mill, Christiano argues that democratic societies are more likely than other societies to yield just outcomes and thus concludes that ‘the tendency will be towards convergence’ (1996: 83). These remarks are clearly close to the Enlightenment ideal of appealing to a universal notion of reason that is based on an ideal of autonomy and a belief that the use of human reason will lead to a convergence of reason and truth. It has been central in this thesis to reject such a strong and controversial understanding of Enlightenment liberalism and, in line with the rejection of autonomy as a moral ideal, these two democratic theories are too strong for justice as impartiality. Even if some convergence is needed it should not be based on a controversial moral ideal such as autonomy. Instead, it is necessary to rely on a somewhat weaker understanding of reason to ground a theory of democracy compatible with liberal legitimacy and pluralism.

To sum up the discussion: justice as impartiality applies to constitutional essentials. It emphasizes impartiality between different conceptions of the good, and rejects an *ideal* of autonomy, although autonomy as such is compatible with the theory. In addition, the theory relies on a key distinction between first-order and second-order impartiality. This distinction is important because if the theory required impartiality in all moral questions, it would cease to be impartial, and instead would depend upon a conception of the good by virtue of putting forward a moral ideal for every aspect of life. This is not the ambition of justice as impartiality, which aims only to describe the appropriate ground rules for people with different conceptions of the good who need to coexist peacefully.



The interpretation I have offered in this section holds that justice as impartiality requires two things of a political system: (1) a set of fundamental rights and (2) a democratic order. The substantive implications are limited and mainly confined to the set of fundamental rights derivable from the Scanlonian original position. This seems to put into question the role of the empirical approach discussed earlier in this chapter. According to that approach, justice as impartiality may generate detailed substantive policies and be applied to assess the impartiality of a range of institutions and principles governing society.

Now we have an overview of the main tenets of justice as impartiality. To make the picture of this theory complete the next section broadens the perspective and shifts the focus to the political implications of this theory. These implications are developed more fully by Barry in *Culture and Equality* (CE) and *Why Social Justice Matters* (WSJM). These works rest on the contractual framework developed in justice as impartiality and articulate in more detail the implications of this approach in controversial cases such as what equality of opportunity requires and the limits of freedom of religion and group specific rights for ethnic and cultural minorities. Considering the implications of justice as impartiality for these cases will, I believe, shed light on the scope of justice as impartiality.

### **3. Political Implications: Social Justice and Group Rights**

Both CE and WSJM are in different ways linked with justice as impartiality. CE shares its intellectual roots with justice as impartiality, while WSJM aims to use the idea of reasonable rejectability as it was developed in justice as impartiality to derive specific principles of social justice. I start this section with a brief introduction to these later works and to the way in which they are linked to the earlier work. As will be clear, my analysis of the proposals in these two later works questions the extent to which Barry's practical proposals can really be claimed to be derivable from justice as impartiality. This observation underlines the difficulties that arise when we move from the general to the specific in terms of what justice implies. I end this section with a discussion that aims both to show that the implications of justice as impartiality are ambiguous and to illustrate the dilemma of convergence and divergence of reason that was central to the argument of the previous chapter. In this respect, justice as impartiality embodies both weak and strong elements reflecting the weak and strong versions of liberal theorizing discussed in the previous chapter. If it is possible to

arrive at a clearer understanding of the role of reason in justice as impartiality, then this will yield valuable insights not only important for how to understand justice as impartiality, but also for the understanding of reason in liberalism more generally. Trying to clarify further the understanding of reason in justice as impartiality will be the focus of the next chapter.

In CE, Barry aimed to refute many of the ideas and policies associated with multiculturalism and to show how a liberal egalitarian approach can either accommodate or reject the claims made on behalf of multiculturalism. Underlying this approach is a faith in a universal notion of reason and a firm belief in the ideals of the Enlightenment that CE shares with justice as impartiality. An underlying premise of justice as impartiality was the rejection of the view that the ‘Enlightenment project of addressing the reason of every human being of sound mind was a gigantic error’ (exemplified by postmodern ironists such as Richard Rorty and community and tradition oriented philosophers like Alasdair MacIntyre) (Barry: 1995: 3-4). CE seeks to continue the defence of the Enlightenment project; Barry describes the book as ‘constitute[ing] a defence of it [the Enlightenment]’ (Barry: 2001: 16). The Enlightenment project is understood by Barry to be concerned with the justification of political institutions by reference to general principles that can be acknowledged by all human beings of sound mind (Barry: 2001: 16). Both justice as impartiality and CE share this common starting point and both aim to justify institutions and policies by reference to reason rather than traditions and shared beliefs. Both can therefore be said to engage in the same project.

In WSJM, Barry’s discussion of how social justice can be realized is not directly concerned with the Enlightenment, but is still closely linked to justice as impartiality. Barry says that ‘a very elaborate chain of argument’ is not necessary ‘to show that the principles appealed to in this book [WSJM] satisfy the ‘reasonable rejectability’ test put forward in *Justice as Impartiality*’ (Barry: 2005: ix). Consequently, this means that the conclusions reached in WSJM are compatible with justice as impartiality, and although they are different projects, both belong within the same theoretical framework. We can see from this that the later works are both somehow engaged in the same project as justice as impartiality either through adopting some of the same foundational premises or through applying the same theoretical framework to derive conclusions. My discussion of these two works will mainly focus on equality of opportunity and the status of group rights. Both these

issues have been controversial among political philosophers and in politics and thus they serve as good examples to judge the implications of justice as impartiality.

Consider first Barry's views on exemptions and group specific rights as outlined in CE. Multicultural critics of liberalism have argued that universal rights may accommodate the majority satisfactorily, but minorities and marginalised groups require special accommodation and special rights to acquire the same status as the majority in modern liberal democracies. Especially well known is Iris Marion Young's claim that universal citizenship of the type advocated by liberal egalitarians, such as John Rawls and Brian Barry (among others), is unable to accommodate minorities and marginalised groups in society (Young: 1989). Consequently, this has given rise to arguments in favour of differentiated citizenship rights (Kymlicka: 1995 and Young: 1989). Another claim frequently made is that liberals 'absolutize liberalism' by dividing 'all ways of life into liberal and nonliberal, equate the latter with illiberal, and talk of tolerating and rarely of respecting or cherishing them' (Parekh: 2003: 240). Although multiculturalism is a diverse concept, many of the claims made by different defenders of multiculturalism share a concern for different minority groups (religious, ethnic and marginalised groups) and for the problems these groups face because the universal rights granted by liberal egalitarians are inadequate for improving their position in society and securing them justice.

A question related to the rights of minorities that has troubled both politicians and political philosophers has been the legitimacy of exemptions granted to cultural, religious and ethnic minorities from generally applicable laws. Liberals have in general been reluctant to grant such exemptions to groups partly because they see such rights as offering certain groups privileges and also because the set of universal citizenship rights is supposed to cover the needs of all citizens including minority and marginalized groups. This concern ties in with the ideal that Barry associates with the Enlightenment – the ideal of justifying political institutions through an appeal to universal reason. From this ambition arises a suspicion of group rights precisely because the set of universal citizenship rights is intended to support and address the needs of all individuals. Therefore, exemptions are 'anomalies to be tolerated because the cure would be worse than the disease. But they provide no support for any extension to new cases... the current exemptions were a mistake that is awaiting rectification at an opportune time, so it would be absurd to add to their number in the meanwhile' (Barry: 2001: 51). For Barry, then, exemptions may be permitted, but are

considered as pragmatic and necessary anomalies. At any rate, this shows that the scope for exemptions is present, but severely limited. Similarly, if groups cannot be granted exemptions from generally applicable rules, the room for granting groups differentiated citizenship rights is equally limited.<sup>13</sup>

This uncompromising attitude towards exemptions is in striking contrast to the importance justice as impartiality attached to proceduralism in earlier sections. When there was disagreement over what was a reasonable public policy we saw that justice as impartiality emphasized the importance of fair and democratic procedures to reach a decision. Moreover, the scope of justice underlined the same concern; it was confined to constitutional essentials. However, what we see here in the case of exemptions and group specific rights is that instead of relying on the democratic process to decide what is reasonable or not, the theory itself provides the answer to what justice requires. Judging from this example, justice as impartiality is not only concerned with constitutional essentials, but also determines what justice requires at a very detailed level.

On the position Barry adopts in CE, justice has not only the procedural and weak substantive implications already discussed, but also strong substantive implications about the content of generally applicable laws. This seems to justify the worry expressed by the democratic theorists mentioned in the previous section who disagreed on principle with the idea of extra-democratic substantive rights attached to the democratic system. This obviously puts into question the relationship between justice as impartiality and CE, as the former does not seem to underwrite the policies suggested in the latter. Since justice as impartiality emphasized constitutional essentials, proceduralism, and peaceful coexistence so strongly it is even more surprising to notice the shift from justice as impartiality to CE.

Moreover, in the previous section we saw how justice as impartiality - through the distinction between first-order and second-order impartiality - had weak implications regarding specific outcomes. The theory aimed instead to offer a framework for making it possible for people with different conceptions of the good to live peacefully together, and an important part of that was the emphasis put on fair and impartial political procedures. The impression was that the theory was mainly

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<sup>13</sup> Barry can be interpreted as more hospitable to exemptions than the impression given above. See Festenstein (2005: 109-118) for a careful and detailed examination of Barry's position. However, in the end, as acknowledged by Festenstein, it seems 'that Barry's response fails to deal with the rationale for claims for difference-sensitive rights and policies (2005: 114).

concerned with securing constitutional essentials such as freedom of religion and freedom of speech, not with detailed outcomes regarding public policy. The impression that one gets from CE is that justice as impartiality does have strong substantive implications, and this is a worry to some democratic theorists as it suggests that substantive principles of justice and their alleged implications trump democracy in a liberal constitutionalist political order. Not only is Barry's view on group specific rights controversial in itself, but the important point to emphasize here is that it has implications for the place of democracy in a Barryian liberal state.

Similar substantive implications appear to apply to the understanding of the ideal of equality of opportunity, too. In the contemporary debate, equality of opportunity is often understood in one of two ways: either as referring to levelling the playing field, which means redressing inequalities in education, income and standard of living among different social groups, or as simply referring to non-discrimination, which means that positions and offices ought to be open to all, regardless of sex, race, sexuality and class-background, etc.<sup>14</sup> On this issue Barry argues in favour of a radical understanding of what levelling the playing field requires, and he claims that this is of utmost importance in realizing justice.

This case offers a second example of how the alleged substantive implications of justice as impartiality are at odds with the procedural framework developed in justice as impartiality. The procedural framework of justice as impartiality does not deliver a strong understanding of equality of opportunity, but that is precisely what Barry argues follows from the reasonable rejectability thesis that is at its foundation. A strong understanding of equality of opportunity is not necessarily at odds with the procedural framework, but it does not at all follow as a requirement. Despite this important distinction, Barry assumes in WSJM that a strong notion of equality of opportunity necessarily arises from justice as impartiality.

Equality of opportunity has been one of the most important issues of social justice for some time, and it constitutes one of the main pillars of social justice for liberal egalitarians such as Barry. Moreover, it is a principle with a great deal of support among politicians, voters and political philosophers alike. One reason why this principle matters so much is that:

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<sup>14</sup> See John Roemer (1998) for a discussion of this understanding of equality of opportunity. See also Andrew Mason (2001 and 2006) for detailed discussions of the role of equality of opportunity in political philosophy.

Children start with, and grow up with, an enormous variety of different resources. On the basis of just a few facts about a child, such as its social class and its race or ethnicity, we can make a good prediction of where it will finish up in the distribution of earnings, the likelihood that it will spend time in jail, and many other outcomes, good and bad.

(Barry: 2005: 41)

On Barry's view, different starting points and wide inequalities have a cumulative effect and they result in, for example, wide differences in life expectancy. For example, males in the poorest areas of Oslo (Norway) can on average expect to live 68 years, while males in the more affluent parts of Oslo can expect to live at least 80 years. This shows that the life expectancy for the least advantaged in one of the wealthiest and most egalitarian societies is actually similar to the life expectancy only found in some of the poorest countries in the world, such as, Vietnam, where the average life expectancy for males is roughly the same as for males in the poorest parts of Oslo.<sup>15</sup> Life expectancy can be more equal within poor societies such as Vietnam compared with more wealthy societies, which implies that they are in a sense more egalitarian.

Although different life expectancies can be the result of different choices and not only of unequal opportunities, the differences in life expectancy between wealthy and poor parts of a society indicate that the living standards between rich and poor groups are wide. Liberal egalitarians claim that in societies where, for example, it is possible for affluent parents to give their children advantages (compared with less affluent parents) in competition for places in higher education there is a serious injustice. The children of less affluent parents start with disadvantages not faced by their more affluent competitors for jobs and places in higher education. Because these children (or their parents for that matter) did not choose to be born into these more unfortunate circumstances, these inequalities are undeserved and irrelevant from a moral point of view. Consequently, justice requires of us that society seeks to ameliorate such inequalities so children of affluent and less affluent parents can have the same opportunities available to them.

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<sup>15</sup> <http://www.ssb.no/ssp/utg/200506/03/>. Report on inequalities of life expectancy by Statistics Norway.

For liberal egalitarians - as we saw in chapter one - a significant distinction when it comes to equality of opportunity is between choice and circumstance. The central idea is that those who through their own deliberate choice make poor decisions contributing towards lower life expectancies or reducing the opportunities available to them must be considered to be responsible for these decisions and thus must bear the costs of them if they made these decisions from an initial state of equality of opportunity. If, in contrast, they were simply born into more unfortunate circumstances that offered them fewer resources and opportunities, then they should not be held responsible for these inequalities or be expected to bear the full consequences of these unchosen circumstances. To level the playing field, it is necessary to identify the circumstances of different groups and persons and see which parts are choice and which are circumstance dependent. Through complex technical schemes, some theorists have tried to differentiate between inequalities due to people's choices or circumstances (see, e.g., Roemer: 1998). The rationale for such exercises is that inequalities based on different choices do not require rectification, while inequalities based on unfortunate circumstances do.

Although Barry is aware of the choice/circumstance distinction (Barry: 1991), he has a different approach to the requirements of justice. Instead of relying on a highly technical (and perhaps fruitless) debate to reach an answer as to what justice requires in terms of equality of opportunity, he instead leans on the findings of social science regarding social inequalities. To reduce the impact of different starting points Barry argues that 'the first demand of social justice is to change the environments in which children are born and grow up so as to make them as equal as possible, and this includes (though it is by no means confined to) approximate material equality among families' (Barry: 2005: 58). A second demand 'is that the entire system of social intervention, starting as early as is feasible, should be devoted to compensating, as far as possible, for environmental disadvantages' (Barry: 2005: 58). Thus, equality of opportunity demands equalization in two ways: equalizing children's environments as much as possible, and the state should intervene as early as possible and as far as possible to compensate and nullify environmental disadvantages.

This strong interpretation of what equality of opportunity requires raises uncertainty about the scope of justice. Recall from the previous section that social justice was not a constitutional essential, and that standards of social justice were 'the stuff of politics'. From the perspective of the empirical method, it is clear that most

current societies – even among wealthy and relatively egalitarian societies such as Norway – are far from realizing equality of opportunity. Part of the problem here is that many inequalities run very deep. These inequalities require far-reaching measures to equalize the environment of children. Hence, to follow the logic expressed in the empirical method, where the aim is to compare actual practices with the ideal, what is required is to equalize as early as possible and as far as possible. This strong interpretation of what equality of opportunity requires raises uncertainty about the scope of justice because it increases the scope of first-order impartiality. The strong interpretation of equality of opportunity would involve the scope of justice extending wider than merely constitutional essentials and the basic framework for democratic politics. The strong interpretation of equality of opportunity implies that children's environments should be equalized as early as possible and environmental inequalities should be compensated for as far as possible. If this were the state's duty, it would extend the scope of first-order impartiality dramatically as it would widen the scope of justice to go far beyond its defined scope in justice as impartiality.

However, such an increase in the scope of first-order impartiality is at odds with the idea that justice is restricted to constitutional essentials and a set of fair procedures for public decision-making. Such an increase in first-order impartiality might also have intrusive implications for how most people understand family life and the upbringing of children. The demands of equality of opportunity would affect family life in quite detailed ways and would undermine the family's sense of control over its own destiny. If such consequences follow, the strong interpretation of equality of opportunity not only seems not to be required by justice as impartiality, but is actually in conflict with justice as impartiality's commitments to the distinction between first-order and second-order impartiality and the scope of justice. This analysis underlines the difficulty highlighted earlier regarding the difficulty of moving between general *a priori* principles and the specific details of how these principles are realized.

To sum up the discussion, both examples discussed in this section are at odds with the presentation of justice as impartiality in the previous section as offering a defence of fundamental rights and a democratic order. The two examples discussed here suggest instead that the scope of justice goes far beyond these two requirements, and not only prescribes the basic rules for the political system and social cooperation, but also determines legislation and social policy in detail. This gives us a different



picture of what justice requires than the account that seemed plausible from the discussion of justice as impartiality in sections one and two. We are now facing two competing views of what justice requires. On the one hand, the scope of justice emphasizes democratic procedures and the protection of the set of fundamental rights found in justice as impartiality. On the other hand, included in the scope of justice are also detailed policies of a highly demanding character expressed in CE and WSJM. These two different views give rise to two entirely different sets of implications. The former view gives rise to a democratic political order where civil and political rights are protected as part of the constitution. The latter view includes both a democratic order and fundamental rights, but moves far beyond these in two important respects. First, justice restricts the content of generally applicable laws and, in effect, this means that justice puts significant limits on what counts as a legitimate reason in politics and legislation. Second, justice has implications for social policy and social rights, and social justice is not merely the stuff of politics, but is also the stuff of justice in a way that goes beyond the account in justice as impartiality.

One might say that these two views arise because of inconsistencies in justice as impartiality or between the theory and its application. For example, the discussion of the *a priori* and empirical method and the difficulty in moving from the general to the particular reveal that these two views are part of the theory from the outset, and it is therefore not surprising to find that there are inconsistencies between the theory and its application. Central to the theory's intention is to suggest a framework for resolving disagreement between different conceptions of the good. However, the empirical method goes further and wants to investigate and compare the general and *a priori* principles with the actual practices of a given society, and seek to bring the practices into line with the principles. The latter approach is more ambitious and seeks to arrive at definite answers as to what justice requires. In contrast, the former seems less ambitious, and leaves a wider range of questions to be settled through democratic decision-making. The tension arises from the fact that while the former approach relies on democracy to settle disputes, the latter assumes that the theory itself can settle many such disputes. In essence, the latter assumes a wider scope of justice than the former. Obviously, the theory cannot at the same time both claim that justice is restricted to constitutional essentials and that it can deliver answers that go far beyond the scope of constitutional essentials.

Another way of putting this point is to say that the empirical approach presupposes that convergence can be reached on a wider set of issues than the interpretation associated with the *a priori* approach. The *a priori* method yields general principles, but leaves wide scope for their implementation in accordance with social and historical contingencies. In this respect, it accepts a diversity of reasons and a wide range of possible outcomes. The empirical method, in addition to the general principles, offers a more limited interpretation of them and leaves a narrow scope for their implementation. Instead of relying on proceduralism to resolve what justice requires, it limits the range of outcomes and requires convergence on what is reasonable. The contrast between the *a priori* and the empirical method can be distinguished in the following way. The *a priori* approach holds that the necessary and sufficient conditions of what justice requires include fundamental rights and a democratic order. While the empirical method goes further and claims that the necessary and sufficient conditions of what justice requires include fundamental rights, a democratic order and significant substantive implications for multiculturalism and social justice.

This leads us to ask which of the two interpretations is most plausible - the modest one or the ambitious one. This question can be re-formulated in the following way: does liberal justice require convergence or divergence of reason? The intentions of the theory and the *a priori* approach emphasize divergence, while the empirical method emphasizes convergence. What makes this into a question of great importance is that this is not only a question of significance for justice as impartiality, but as we saw in the previous chapter, it is also a question that is important for the understanding of contemporary liberal theorizing in general. Thus, it seems that justice as impartiality runs into exactly the same problems as the theories discussed in the previous chapter, and represents no improvement on the theories examined there. If it is not possible to make progress in any way on this issue, it seems that the notion of reason within contemporary liberal theories is not suited to satisfy the conditions of both liberal legitimacy and pluralism.

#### **4. Concluding Remarks**

In this chapter, I outlined the central tenets of justice as impartiality and the underlying contractual theory on which it is based. From this framework, justice as impartiality has two main requirements: (1) justifying a set of fundamental rights, and (2) a

democratic order. In addition, the theory relies on two important distinctions. First, the theory distinguishes between first-order and second-order impartiality. Second, it distinguishes between the *a priori* and the empirical method. The *a priori* approach justifies general and abstract principles, while the empirical method goes further and justifies detailed policies and a limited scope for exemptions and group specific rights. The general impression to take away from the discussion of justice as impartiality is that it is a theory that leaves wide scope for democratic decision-making and is without many substantive and detailed substantive implications. Effectively, this limits the scope of justice to fundamental rights and a democratic order.

However, this promising impression was partly undermined when the alleged political implications were taken into account, and if this is the only way to understand the theory there are few reasons to be optimistic about the prospects of developing a liberal constitutional order satisfying liberal legitimacy and pluralism. Although the situation does not look promising for developing a liberal constitutionalist framework, I believe justice as impartiality contains many useful elements for building a liberal constitutional framework, such as the emphasis on proceduralism, the wide room for participation and deliberation, and the firm protection of fundamental rights. In the next chapter, I will investigate the possibilities of re-interpreting some of the controversial implications discussed in this chapter in a weaker and more modest way. If that investigation proves promising, the possibility of developing a liberal constitutionalist order satisfying liberal legitimacy and pluralism might have a better chance of succeeding.

## CHAPTER FOUR

### Impartiality: Convergence or Divergence?

*If citizens deliberate when adequately informed... the general will would always result from the great number of slight differences, and the resolution would always be good.*

Jean Jacques Rousseau<sup>16</sup>

Unfortunately, by now it should be clear that things are not as easy as Rousseau wants us to believe. What it means to be ‘adequately informed’ depends on the stance we take on convergence and divergence of reason, and we have seen that both the ideas of ‘informed’ and ‘reason/reasonable’ easily escape clear and precise definition. The task of this chapter is to apply the insights from the analysis in the previous chapter to specify a more precise understanding of these terms in relation to justice as impartiality. If this can be accomplished it will strengthen the possibility for developing a liberal constitutional order satisfying liberal legitimacy and pluralism. I will start with a discussion of reason in justice as impartiality, and argue that understanding reason in a weaker and more modest way will guide us towards a more plausible interpretation of the theory. This means that the strong and uncompromising implications discussed in the previous chapter are not required by the theory.

I will argue in section two that it is necessary to distinguish between what justice requires and what is consistent with justice. What justice requires are fundamental rights and a democratic order. The implications discussed in the previous chapter can be consistent with justice under certain circumstances, but are by no means required in the same way as fundamental rights and democracy. By invoking this distinction – the distinction between what justice requires and what is consistent with justice – the notion of reason is weakened and brought back in line with the modest and procedural emphasis that was an attraction of justice as impartiality in the first place. In section three, I will elaborate on the distinction between first-order and second-order impartiality. This distinction is vital if we are to place limits on the use of political power and to ensure that justice does not require impartiality in every situation. An important point regarding this distinction is that the way it is drawn aims

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<sup>16</sup> *The Social Contract*, p. 173

to leave wide scope for individual discretion, which in turn emphasizes the weak aspects of justice as impartiality. Furthermore, a crucial implication of this is that democracy is assigned an important role in the theory.

It has been objected against the weak interpretation I advance in this chapter that it is too weak to do the work it is supposed to do (Pettit: 2000). Pettit's critique of contractualism aims to show that the weak interpretation is unpersuasive because it is unable to accommodate consequentialist intuitions when they are plausible. I argue in section four that contractualism is able to arrive at plausible conclusions regarding consequentialist intuitions. If this conclusion can be sustained, then this chapter will have developed an understanding of reason that can serve as a useful starting point for developing a liberal constitutionalist order, and the first of the three main issues of this thesis will have been resolved.

## **1. Reason and Contractualism**

In this section I ask: what counts as a reason in contractualism? The uncompromising notion of reason displayed in CE and WSJM does not fit well with Barry's interpretation of what informed agreement involved. To spell out the different understandings of reason I will briefly recap some of the main points from the previous chapter. Recall first that informed agreement for Barry required that the agent be able to comprehend different competing policies and understand the way in which they would affect him. In addition, the entire point of justice as impartiality was precisely not to take a position on the content and truthfulness of different doctrines, and instead leave it to democratic decision-making to decide which doctrine to implement.

However, what Barry is doing in WSJM and CE is to apply a narrow conception of reason and impartiality, which blurs the distinction between impartiality and the evaluation of substantive doctrines. The position in WSJM and CE is strikingly different from the outline of justice as impartiality in many ways, but the position in WSJM and CE share similarities with the empirical method. The point of the empirical method was to investigate empirically whether the actual institutions and laws in a particular society complied with impartiality. The conclusions in WSJM and CE can to some extent be understood as examples of how the empirical method is supposed to work.

If that is correct then there seems to be a tension between the *a priori* and the empirical method in justice as impartiality. The difficulty of moving from the *a priori* to the empirical method was pointed out in the previous chapter. It was clear that it was relatively easy to see what the abstract and general principles of the *a priori* method required, but as with the example with gender equality, it was not so clear what gender equality actually required in terms of policies and institutions. Reserved seats for women in parliament may or may not be reasonable; the answer depends on social and historical circumstances. In WSJM and CE, Barry argues that justice requires not only a strong understanding of equal opportunity and a minimal scope for group exemptions, and he also suggests specific policies and institutions.

In making these claims, Barry does not take into account that justice, impartiality, and equality can be achieved through different means. Different policies and institutions can realize the ideals and principles of justice, and the mistake I will argue Barry makes is to be insensitive to this crucial practical side of social justice. More specifically, the mistake Barry commits is to give the impression that injustices can be eradicated through only one set of policies and institutions (i.e., a strong understanding of equality of opportunity and limited room for group rights). The empirical method as it was outlined in the previous chapter did not say anything about the specific policies and institutions that justice requires. The point of the empirical method was more to identify injustices than to describe a political programme.

Nonetheless, the tone in WSJM and CE is strikingly different. There, unjust practices are not only pointed out, but a wide range of policies and institutions are prescribed to remedy these injustices. This is not necessarily problematic in itself. It is legitimate to propose ways of realizing social justice, but the problem is when these remedies are described as necessary for justice. Recall that Barry argued that justice required equalization of children's environments as early as possible and as much as possible to realize equality of opportunity. Given certain social and historical contingencies in a particular society, such policies and the institutional framework for carrying them out might be consistent with justice. But, importantly, I think it is wrong to argue that justice requires this policy. The interpretations of what justice requires in both WSJM and CE goes beyond the framework of justice as impartiality, and the interpretations put forward there cannot be said to be supported by the theory as necessary for the realisation of justice.

What justice as impartiality requires is not a set of detailed policies and a specific set of institutions to deal with social justice, but instead the theory prescribes the ground rules of the political system. The distinction between first-order and second-order impartiality and the ‘list’ of constitutional essentials both contribute to defining these ground rules. In justice as impartiality the scope of justice was confined to constitutional essentials (the workings of the political system and civil and political rights), while all other issues were the ‘stuff of politics’. When an issue is the ‘stuff of politics’ it is up to the democratic assembly to make the decisions on the issue, and justice does not prescribe a specific policy or institution (although it will, of course, limit the range of acceptable policies or institutions). This supports the conclusion that the framework in justice as impartiality embodies a weaker notion of what justice requires than is suggested in WSJM and CE.

Now, through this examination of some of the central points of the previous chapter, we can now see that the conclusions in WSJM and CE would require convergence of reason on a wide set of premises and propositions, and that they therefore rely on a problematic notion of reason from the perspective of liberal legitimacy and pluralism. What justice as impartiality requires is convergence of reason on the justifiability of democracy and a set of civil and political rights. This is a weaker notion of reason with more room for accommodating both liberal legitimacy and pluralism. The scope of politics is wider; a wider set of issues is up for grabs. This gives concessions to pluralism as a wider diversity of reasons is acceptable in politics. Furthermore, civil and political rights ensure that the political system avoids the problems associated with politics as coordination (such as the use of threat advantage). The framework of justice as impartiality is strong enough to avoid the disadvantages of politics as coordination. Simultaneously, it is weaker than the consensus-oriented models suggested by Habermas and Rawls. The number of propositions that require convergence of reason are fewer in justice as impartiality than in the theories of Rawls and Habermas. Justice as impartiality thus represents a model that is balancing the need for convergence on the basic ground rules of the political system with the need to accommodate diversity and pluralism.

This weak understanding of the role of reason in justice as impartiality is supported by some of the later developments of Scanlon’s thinking on reasons. Scanlon is interested in a specific type of reason, more precisely, ‘whether it is a *good* reason – a consideration that really counts in favor of the thing in question’ (Scanlon:

1998: 19, original emphasis). This type of reason ought to be contrasted with what ‘could be someone’s operative reason’, which refers to the actual reason a person might have (Scanlon: 1998: 19). The first type of reason describes the ‘attitudes that an ideally rational person would come to have whenever that person judged there to be sufficient reasons for them’ (Scanlon: 1998: 20). These judgements are called ‘judgement-sensitive attitudes’ as they are sensitive to the judgements made by rational deliberators.

A rational person is ‘a reasoning creature – one who has the capacity to recognize, assess, and be moved by reasons, and hence to have judgment-sensitive attitudes’ (Scanlon: 1998: 23). In contrast, irrationality ‘occurs when a person recognizes something as a reason but fails to be affected by it in one of the relevant ways’ (Scanlon: 1998: 25). This does not mean that one is automatically irrational if one recognizes the force of a reason, but fails to act on it, as there are situations with limited time for deliberation, and sometimes one’s reasoning is based on mistaken assumptions. In such situations, one is not irrational, but ‘open to rational criticism’ (Scanlon: 1998: 25-27).

Between ‘the minimum standards marked out by the idea of irrationality and the ideal of what it would be (most) rational to believe or do, there are the notions of what is reasonable and unreasonable’ (Scanlon: 1998: 32). These ‘judgments about what it is or is not reasonable to do or think are relative to a specified body of information and a specified range of reasons, both of which may be less than complete’ (Scanlon: 1998: 32). Reasonableness is a less demanding understanding of what the most rational thing to do involves, and hence is adapted to how actual decisions are made.

An important element of this notion of reasonableness is the idea

that we have a general method for thinking about reasons for action in the right way... that is stable in its results, and supports wide interpersonal agreement on a significant range of conclusions. All of this taken together provides ample ground for saying that judgments about reasons for action are the kind of things that can be correct or incorrect, even though there are many cases in which we may continue to disagree.

(Scanlon: 1998: 70)



Taken together these ideas can be summarised in the following way: contractualism is concerned with what constitutes good reasons (in the standard normative sense) for certain attitudes (judgment-sensitive attitudes), and not with empirical and causal phenomena. Rationality means the ability to be moved by judgement-sensitive attitudes, while irrationality means an agent is failing to conform to his own judgment-sensitive attitudes. Between these two extreme notions comes the notion of the reasonable, which means what is the most rational thing to do given the available information at the time of decision-making. This method of reasoning is able to reach correct judgments and to provide wide agreement on these judgements.

Scanlon holds on the one hand that some reasons can yield wide interpersonal agreement and that reasons must be evaluated with regard to the available information at the time a decision is made. Furthermore, there is a method for reasoning giving stable and correct answers. The crucial question is then how far the convergence of reason can be extended. I will argue that it extends to the *a priori* approach discussed in the previous chapter. That means that the method of reasoning can yield interpersonal agreement only on questions such as slavery and apartheid. On more particular matters, the notion of reasonableness implies that different answers can be given to the same question because the different parties have different available information at the time of decision-making, and even with the same available information it is possible for people to disagree as different weight is attached to different arguments (Rawls: 1996: 54). In addition, this view fits with the idea that different social and historical conditions lead to different requirements.

Thus, the understanding of reason in Scanlon's contractualism gives some support to the weak interpretation of reason that I defend in this chapter. This should further undermine the strong interpretation put forward in WSJM and CE. In the rest of this chapter I will develop and defend the plausibility of this interpretation. An important aspect of this effort is to show how the *a priori* approach can be aligned with the empirical method. The *a priori* understanding of reason gives rise to abstract and general principles and is crucial in justifying a set of civil and political rights and in justifying a democratic order. These are general principles that can be reached through reasoning alone, and thus are subject to wide interpersonal agreement, while when it comes to most actual political decisions, these decisions rely on a multitude of social and historical factors where the same extent of interpersonal agreement is not possible. Different people will attach different weight to many of these different social

and historical contingencies and in addition, there might exist several equally plausible policies to realize, for example, social justice. Under any circumstances, the conclusions are not universally valid or required by justice as suggested in WSJM and CE.

To sum up the argument of this section, the weak understanding of reason requires convergence on civil, political rights and democracy, while accepting divergence on all other political issues. This is how justice as impartiality attempts to balance the convergence and divergence of reason. This model avoids the pitfalls of politics as coordination, and the demandingness of politics as consensus. If this interpretation of justice as impartiality can be sustained, it represents an attractive understanding of reason that satisfies liberal legitimacy and pluralism. On this interpretation, civil, political rights and democracy are defined as universal values, while other political issues are relative to context. The next section seeks to elaborate this distinction and to show how it supports the weak interpretation of justice as impartiality.

## **2. Universalism and Relativism**

The distinction between universalism and relativism in Scanlon helps us to identify where convergence is required and where divergence is plausible. Through an examination of how this distinction applies to justice, I will argue that this give rise to a distinction between what justice requires and what is consistent with justice. This distinction builds on the distinction between a weak and strong understanding of reason as developed above, but aims to develop this distinction further and arrive at a more precise interpretation of it. Distinguishing between what justice requires and what is consistent with justice gives a solution to the challenge of how convergence and divergence can be balanced in liberalism.

Contractualism holds that some actions or principles are universal. Examples of practices that could reasonably be rejected under any circumstances are slavery, and killing and torturing people just for fun. In addition, there exists a ‘domain of judgments of right and wrong that depend on reasons for rejection that people have under certain social circumstances’ (Scanlon: 1998: 348).<sup>17</sup> Examples of such issues

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<sup>17</sup> In fact, Scanlon mentions a third domain in addition to the universal and context-dependent domains based ‘on the idea of what we owe to others but on the appeal of particular values that we may share’ (Scanlon: 1998: 348-349). This domain refers to the idea that if we join an association or an activity

are ‘abortion, the treatment of nonhuman animals, standards of social justice, and the extent of our duties to aid others’ (Scanlon: 1998: 357). So far, this distinction does not tell us much, but it is notable for a discussion of what justice requires that both abortion and standards of social justice are thought by Scanlon to be context dependent and not matters subject to universal principles.

More specifically, there are two main ways in which context influences what can, and cannot, be reasonably rejected. First, there are those cases ‘in which there is a need for some principle to govern a particular kind of activity, but there are a number of different principles that would do this in a way that no one could reasonably reject’ (Scanlon: 1998: 339). This gives rise to a principle Scanlon calls the Principle of Established Practices, which holds that in situations where a specific principle is accepted in a community, it is wrong to violate it just because it is convenient to do so (Scanlon: 1998: 339). This principle cannot reasonably be rejected because some principle is needed and one is established by custom. It is not necessary to have unanimous support for the principle for it to be binding, as there will always be dissenters.

An important point related to the Principle of Established Practices indicates one of the ways contractualism differs from relativism. Contractualism can in this way explain why a generally, but not unanimously, accepted principle can be binding on all. Scanlon holds that these cases are not cases of relativism at all, but cases of universalism because ‘the moral force of these variable practices is explained by appeal to a single substantive moral principle’ (Scanlon: 1998: 340). This is a significant point regarding the status of political obligations. The Principle of Established Practices shares some similarity with the conception of politics as a coordination game, and both seek to defend the idea that an outcome can be legitimate even if it does not enjoy universal consent. Here the resemblance ends though, because contractualism is not based on the idea that a coordination point is justified merely because of mutual advantage. What is important to notice is that The Principle of Established Practices points out how citizens may have political obligations to obey the law, even if they disagree with the current legal order.

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requiring the following of certain moral rules we have obligations to our co-members to follow these rules. A typical example would be the expectations members of a religious community have that the other members will follow the religious doctrines on which their faith is based. These obligations do not apply to non-members and are not relevant to my analysis of justice and democracy.

The second way in which context influences rejectability is that different societies may have different generic reasons for rejecting or accepting a principle or practice. In individualistic societies people might think differently about the need for privacy than in family and community oriented societies. People in the former type of societies will have different generic reasons 'for wanting forms of protection of the sort that rules of privacy provide' (Scanlon: 1998: 341). In such cases 'what matters, in deciding whether a principle can reasonably be rejected for application to a certain society, is whether, in that society, people in the positions that the principle describes have good reason to want a certain opportunity or a certain form of protection' (Scanlon: 1998: 340). Notice here that what matters is not what people *actually* think (their operative reason), but what they have good reason to think. People in the actual situation might not think of a certain principle as rejectable because their social circumstances have shaped their beliefs in such a way that they have come to accept certain practices even if they have good reason to object to such practices. An obvious example is how many women throughout history accepted an inferior status to men as natural or legitimate. Although they did not think that such an inferior status was objectionable at the time, contractualism holds that they still had a good reason for rejecting their inferior position. This, importantly, points out the way in which contractualism differs from relativism, since contractualism rejects the idea that what people actually think gives us good and valid reasons for rejecting or accepting certain practices.

There are two important points to observe about the relationship between universal and relative principles. First, although the contractualist account holds that there are moral principles of universal validity, it does not specify a fixed list of those principles. The job contractualism is doing is to offer a framework to test moral principles and the extent to which they can be rejected or not. Second, it is not the case that social meanings always decide what is right or wrong. What matters are the reasons the involved persons have. Applying this account of universalism and relativism to questions of justice can help us to identify how to balance convergence and divergence of reason.

Firstly, in a given situation, there might be several alternative practices satisfying a universal principle. As discussed in previous chapters, gender equality might be achieved in different ways, for example, by having, or not having, reserved seats in parliament. What justice requires is the treatment of men and women as

equals, not a reserved seat system *per se*. Supposing then, that a reserved seat system is feasible and a practical way of realizing treatment and representation between men and women as equals, the important point is that reserved seats may be one of two proposals that are consistent with what justice requires. If so, both schemes can realize equality, but neither is a requirement of justice. Thus, both are within the range of justice, and can be implemented to realize what justice requires. I take it that this is a vital insight of the Principle of Established Practices; that often there are a range of justifiable practices, and the adoption of one of them is required with regards to the need of coordination, but which of them is to be adopted depends on the context (for example, social, economic and historical contingencies). According to the Principle of Established Practices, if a democratic assembly decides to implement a reserved seat system for women, those who reject reserved seats for women in parliament in favour of some other arrangement that enhances women's rights are still bound to accept reserved seats as legitimate and to respect the legal obligations such a policy might require.

Secondly, distinguishing between first-order and second-order impartiality is a way to distinguish between universal and relative principles. As Scanlon noted above, individualistic and communitarian societies might think differently about questions of privacy. Similarly, individualistic and communitarian societies might think differently about how to distinguish between first-order and second-order impartiality. In communitarian societies where people share the same conception of the good the scope for first-order impartiality might be wider. Because they share the same conception of the good, and the society therefore enjoys wider agreement on questions of personal morality, there might be wider scope for first-order impartiality and fewer questions will be left to individual discretion. Although this opens up the possibility of drawing the line between first-order and second-order impartiality differently in communitarian and individualistic societies, this is limited to recognizing what good reasons people might have to think differently about how to distinguish between the first- and second-order. If there are certain features in a communitarian society, such as providing wide support and care for extended family members, it is thinkable that such considerations might count as good reasons for drawing the distinction between first-order and second-order impartiality differently compared with more individualistic societies.

Some might object that this puts significant restrictions on what can count as non-rejectable principles and is thus not sufficiently sensitive to be able to accommodate different conceptions of the good. However, given the understanding of reason suggested in the previous section, I will hold that it should be wide enough in scope to accommodate different views on this issue. Moreover, the point of a theory of justice is not to accommodate everything; the point is to define certain principles and practices as just or unjust. Precisely because of this point, it should not be a surprise for anyone that a theory of justice simply rules out certain practices as unjust. The attempt is rather to strike a balance so that objectionable practices can be ruled out, but still leave ample scope for accommodating diversity and individual discretion. The understanding of reason discussed in the previous section together with the distinction between what justice requires and what is consistent with justice together explain how justice as impartiality seeks to respond to this challenge.

To apply these distinctions to the two cases discussed in chapter three – the interpretation of group rights and equality of opportunity – I will argue that both interpretations are consistent with justice, but neither is required by justice. To say that both schemes are consistent with justice means that whether they accord with justice depends on the social, economic and historical contingencies that obtain in a particular society. The Principle of Established Practices might be a reason for understanding exemptions for groups in a restrictive way that is consistent with justice, and in a society where the principle of equality of opportunity is of great concern, more intrusive means can be justified to realize this principle. Therefore, the status of group rights and equality of opportunity is that justice does not require an implementation of them exactly along the lines of Barry's strong interpretation, but the strong interpretation is not categorically ruled out either. The essential idea is that different societies and different schemes might realize justice through different means.

In this section, we have seen how the distinction between what justice requires and what is consistent with justice can fruitfully be combined with Scanlon's distinction between universalism and relativism. This distinction shows how one can balance the competing claims of convergence and divergence of reason. The discussion of this balance in this section has mainly been general. To show that this distinction is plausible, the next section will discuss how justice as impartiality has some advantages in balancing the competing demands from convergence and divergence compared to the coordination and consensus theories that were discussed

in chapter two. A central idea in justice as impartiality is the distinction between first-order and second-order impartiality and my discussion in the next section will concentrate on how this distinction relates to the distinction between universalism and relativism and the convergence and divergence of reason.

### **3. The Right Level of Impartiality**

A common criticism of impartialist morality is that it requires universal first-order impartiality (Williams: 1981, Bubeck: 1998). Although, I do not doubt that it is possible for justice as impartiality to draw a distinction between first-order and second-order impartiality, it is not clear how this distinction is to be drawn. In deciding this, I will argue that this line ought to be drawn in such a way that the two unattractive features of politics as coordination can be avoided (that there were no strict limits on political power, and relative bargaining power was permitted to influence outcomes).

I will start by presenting briefly the three main arguments against universal first-order impartiality from the perspective of justice as impartiality. The first argument revolves around the necessity of having control of one's own life. A legitimate political order marked by diversity and pluralism requires that enough space is left for people to pursue their own conceptions of the good. Otherwise, those who do not have an opportunity to pursue their own conception of the good have good reason to object to such a political order.<sup>18</sup> Therefore: 'regardless of our conception of the good, we all want some ability to control our own corner of the world, and in return for that we are prepared to relinquish the chance of exerting control over others in their corner of the world' (Barry: 1995: 200-201). Universal first-order impartiality would be incompatible with the idea that people would be left with discretion to pursue their own conceptions of the good and so can be reasonably rejected.

The second argument is called the problem of coordination. The rules of justice adopted by a society regulate the members' behaviour. The more detailed the regulations are, the closer society is to universal first-order impartiality.

A society with a norm of universal impartiality, however, would be one in which everybody was supposed to show equal concern for all. It would be

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<sup>17</sup> Certainly, those conceptions of the good which rely on practices in conflict with fundamental rights cannot expect to be accommodated, and those who hold such a conception cannot legitimately claim the same right to pursue their conception of the good.

regarded in such a society as wrong to show special concern for the welfare of oneself or those close to one...it is apparent that such a society would throw up horrendous problems of coordination, simply because everything would be everybody's business.

(Barry: 1995: 204)

Furthermore, in practice it would be impossible to enforce strict universal first-order impartiality. Because such strict coordination is both undesirable and impractical, the solution is to leave a considerable number of considerations to the members of society.

The third argument relates to compliance with first-order impartiality. A system of universal first-order impartiality would need a strict and efficient system of enforcement.

In an attempt to secure strict impartiality in all areas of life a huge number of decisions that are now left to private judgement would have to be turned over to public officials; and all decisions left in private hands would be open to scrutiny and censure on the basis of the hypertrophied positive morality of society.

(Barry: 1995: 205)

This would create an enormous bureaucracy, and it would also imply suspicion of citizens' judgement, and an ability on the part of the authorities to make decisions about how citizens should live their lives. As with the arguments from control and coordination, compliance has several undesirable side-effects which show that first-order impartiality is incompatible with justice as impartiality.

The parties in the original position (I use this term to describe the Scanlonian choice situation) would reject a social order where they did not have the chance to pursue their own conception of the good. Furthermore, they would reject the idea that every aspect of their lives would be subject to scrutiny by public officials. We see from these arguments that justice as impartiality clearly rejects universal first-order impartiality, but that it does not rule out the possibility that first-order impartiality applies in some contexts. The crucial point to decide here is where the distinction between first-order and second-order impartiality is drawn. However, the three arguments above help us to see where this distinction can be drawn.



In essence three considerations are important. (1) Almost everyone's life goes better when a wide range of decisions is left to individual discretion. (2) There are legitimate limits to government interference. (3) Government interference and first-order impartiality are important in coordinating people's behaviour, but this is restricted by (1) and (2). Clearly, this takes justice as impartiality in the direction of the weak understanding of the implications of justice. In fact, these three arguments do not look very different from politics as coordination. Both accounts emphasize coordination, and that legitimacy is gained through a political order where it is possible for each individual to pursue their own conception of the good.

Despite these similarities, justice as impartiality and Waldron's account differ on some crucial points. Firstly, justice as impartiality holds that there are strict limits to what a government can do. Secondly, a justifiable political order requires more than merely coordination. According to justice as impartiality, people can legitimately reject a political order that places a heavy burden on them, even if this political order offers mutual advantage. These two differences give rise to an important feature that is not present in Waldron's account, namely a set of fundamental individual rights. Thus, from the Scanlonian original position a set of constitutional essentials is derivable. These are the civil and political rights associated with liberalism. Such rights aim to protect the basic interests of a person such as freedom of religion, freedom of speech, the integrity of the person, freedom of association and equal political rights. These rights are derived from concern for control over one's own life and they specify limits to government interference (including interference from other agents with an interest in controlling individual behaviour). Adopting equal civil and political rights is a way to ensure these basic interests. We see that the focus on fundamental individual rights turns justice as impartiality into a much stronger conception justice, relying on a more substantive notion of reason, than is found in Waldron's account.

The attempt here is to create a balance between the strong and weak elements of reason so as to make sure that there is room for individual discretion in those areas where it is important, and first-order impartiality where this is required. Barry formulates this concern succinctly when he says that:

what justice as impartiality calls for is...neither too much first-order impartiality nor too little first-order impartiality but just the right amount ... What is required is a set of rules of justice (including, it should be recalled, both legal and moral norms) that provide everybody with a fair opportunity of

living a good life, whatever their conception of the good may be, while leaving room for the kind of discretion in shaping one's life that is an essential constituent in every conception of the good life.

(Barry: 1995: 206-207)

The driving concern here is that both first-order and second-order impartiality are necessary to create a just order. In fact, to some degree first-order impartiality is demanded by justice in certain areas of life, as it seeks to offer protection to individuals' basic interests.

The distinction between first-order and second-order impartiality supports the conclusion reached in the previous section that the weak interpretation of justice as impartiality ought to be maintained. Justice as impartiality holds that a legitimate political order is based on a set of fundamental individual rights and a democratic order. These are the two main implications of the theory. Fundamental rights protect the basic interests of the person; a democratic order ensures a fair and legitimate procedure for making public decisions. Both schemes from the perspective of justice as impartiality seek to realize the equal moral worth of each person and to secure impartiality regarding different conceptions of the good.

These two elements show the contours of how justice as impartiality responds to liberal legitimacy and pluralism. Individual rights make the conception of justice stronger than Waldron's weak notion, and seek to avoid the problems associated with his approach. Justice as impartiality requires convergence of reason concerning these rights, but on my weak interpretation this is still much weaker than the consensus required by Habermas and Rawls. Because justice as impartiality does not require that decisions ought to be made by consensus, and it does not require the objectivity of political judgements, the theory occupies a middle position between coordination and mutual advantage theories and consensus theories such as those offered by Habermas and Rawls. The combination of a strong concern for fundamental rights and the need for a strong democratic order offers, according to justice as impartiality, a political order justifiable to everyone. Thus, liberal legitimacy and pluralism are satisfied by an account with an emphasis on rights and with few other substantive implications. Instead, democracy is called upon to resolve most disputes about justice. This is legitimate against a background where the democratic procedure satisfies certain

requirements such as equal voting rights and a process with equal possibilities for influencing the outcome and so on.

This weak interpretation of reason that support this strong emphasis on democracy and fundamental rights has been criticized for being too weak. I will discuss the strength of this objection in the next section.

#### **4. Is the Weak Interpretation too Weak?**

Much of the discussion so far has centred on whether liberal theories of justice have strong or weak substantive implications. I have been critical of both Reformation and Enlightenment liberalism, and instead have advanced justice as impartiality as a plausible way of balancing the competing demands of liberal legitimacy and pluralism. It has been argued against this way of understanding contractualism that it is too weak to serve as a foundation for the principles it seeks to justify. Pettit admits that the weak understanding is plausible in itself, but to the question of whether it can be endorsed as persuasive he answers that it is not persuasive because ‘the theory is bound to violate consequentialist intuitions, as Scanlon himself insists. As someone who wishes to preserve such intuitions, therefore, I [Pettit] must reject the contractualist theory’ (Pettit: 2000: 163). Scanlon’s thinking on consequentialism is complex and it is true that many consequentialist policies are ruled out on his account, but he aims to include many consequentialist conclusions where they appear plausible (Scanlon: 1998: 229-241).

There has been an intense debate over whether Scanlon’s contractualism deals successfully with aggregation.<sup>19</sup> At the heart of the issue is the question of whether contractualism blocks aggregation when aggregation is plausible. I will now discuss one example where contractualism appears to get the right answer concerning consequentialism. If this example is sound, it will constitute a counter-example to Pettit’s objection above and undermine the force of his objection. This does not mean that contractualism offers the right answer to all questions of justice, but it is an important example because it concerns the relationship between democracy and fundamental rights.

The example I will discuss takes issue with how it is possible for contractualism to reach plausible conclusions regarding two political schemes of

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<sup>19</sup> See Reibetanz (1998), Otsuka (2000), Kumar (2001), Hirose (2001), Hooker (2003) Raz (2004), Parfit (2004).

consequentialist character: judicial review and plural votes. Both judicial review and plural voting are consequentialist schemes in that they are both usually justified by their good consequences. Given this shared feature, Richard Arneson has argued that judicial review and plural voting come together as a package because the underlying thinking behind both schemes is the same.<sup>20</sup> Judicial review is here understood as the right of the judiciary to overrule legislation enacted by a democratically elected assembly or government. According to Arneson, this is essentially the same as vesting political power in the hands of unelected judges and deprives democracy of the ideal of equal political power. This scheme resembles the underlying thinking expressed in Mill's idea of providing educated elites with plural votes, which is also problematic from a democratic perspective as it seemingly undermines the ideal of political equality. Crucial here is that both schemes are justified in so far as they lead to superior consequences when compared with the outcomes of strict political equality. The conclusion that follows, according to Arneson, is that those who accept judicial review are bound to accept plural voting.

Justice as impartiality supports a principle of judicial review (chapter three), although the judiciary does not play a dominant role in the theory. In addition, the theory gives rise to strong support for democratic equality, and democracy as understood by justice as impartiality is incompatible with plural voting. For contractualism to reach plausible conclusions on issues of a consequentialist character, it is important for the theory's coherence that judicial review can be justified without that justification applying to plural voting. The question is: is there any way justice as impartiality can endorse judicial review without endorsing plural voting?

I believe this dilemma is resolvable for justice as impartiality, and that contractualism offers a solution that is both sensitive to consequences and outcomes, but yet able to reject plural voting while justifying judicial review. Thus the contractual solution endorses consequentialism when it is plausible (judicial review) and rejects it when it is implausible (plural voting). This does not mean that contractualism will necessarily endorse consequentialism when consequentialism

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<sup>20</sup> Articulations of this view are found in the following articles by Arneson: Arneson, Richard J., *Democratic Rights at National and Workplace Levels* (1995), *The Idea of Democracy*, (eds.) Copp, Roemer and Hampton. Arneson, Richard J. *Defending the Purely Instrumental Account of Democratic Legitimacy* (2003), *The Journal of Political Philosophy*, Volume 11, Number 1, pp. 122-132. Arneson, Richard J., *Democracy is Not Intrinsically Just* (2004), *Justice & Democracy*, (eds.) Dowding, Goodin and Pateman.

seems plausible, but it at least means that contractualism does not reject consequentialist thinking in the way Pettit argues it does.

Contractualism is based on what is rejectable from the perspective of the individual and this view is apparent in its concern for fundamental individual rights. To see how important the individual is in contractualism consider the following example from Scanlon:

Suppose that Jones has suffered an accident in the transmitter room of a television station. Electrical equipment has fallen on his arm, and we cannot rescue him without turning off the transmitter for fifteen minutes. A World Cup match is in progress, watched by many people, and it will not be over for an hour... Should we rescue him now or wait until the match is over? Does the right thing to do depend on how many people are watching?

(Scanlon: 1998: 235)

Contractualism suggests that it is wrong to wait regardless of the number of viewers, because 'if one can save a person from serious pain and injury at the cost of inconveniencing others... then one must do so no matter how numerous these others may be' (Scanlon: 1998: 235). Analogously, contractualism holds that it is wrong to violate an individual's fundamental rights regardless of the benefits gained by the majority. We are obliged to protect the fundamental rights of every individual, even if this goes against what the majority may favour. Such obligations undeniably inconvenience the majority, and on an aggregative view, the benefits associated with the majority may outweigh the benefits associated with protecting an individual's rights. Nevertheless, the rights of the individual must be protected because a person who experiences his rights being violated can reasonably reject any scheme that permits such a violation. If judicial review protects individual rights in this way, judicial review is justified by contractualism. Notice here that although a contractualist justification of judicial review focuses on the outcome, it does not focus on the aggregative aspects of the situation. The crucial idea is that of protecting each and every individual's fundamental rights not that the overall benefits achieved legitimates judicial review.

Instead of focusing on the aggregative aspects of the situation, Scanlon's contractualism proceeds from the assumption that 'all the grounds for rejecting a principle... arise from generic reasons that an individual would have who occupied a

certain position in the situations to which that principle applies' (Scanlon: 1998: 229). The only aggregation allowed on this account is aggregation within 'each person's life' (Scanlon: 1998: 237). This means that contractualism holds that the justifiability of a moral principle depends only on the reasons that an individual can have for rejecting a principle, and hence contractualism can reject utilitarianism and other forms of consequentialism (aggregation) (Scanlon: 1998: 229). This assumption is important in seeing why contractualism rejects plural votes.

Reformulating the principle of plural voting in a contractualist way we arrive at the following: 'no one can reasonably reject a system of voting where the best qualified have more votes than those less qualified, because this system will produce superior decisions and produce the fairest outcomes'. Why is this principle reasonably rejectable? Firstly, because underlying plural votes is the idea that even if political equality is eroded or denied, the benefits achieved from plural voting are greater than any losses because the outcomes of democratic decision-making will be more just. Because the outcomes of the state with plural votes are more just then, on an instrumental justification, a state with plural votes is justified. When the benefits and disadvantages of these two states are compared and weighed, plural votes are justified if the benefits outweigh the disadvantages. In this respect the justification of plural votes is aggregative; it mandates that we choose the state of affairs that on an aggregative view is more just. On the purely instrumental view taken by Arneson, the most beneficial is taken also to constitute what is most just.

Contractualism, in contrast, rejects the view that what produces most benefits is also most just. Even if consequential thinking is allowed to play an important role in contractualism, the role it plays is always from the perspective of the individual. Thus, consequential concerns are constrained by what is reasonably rejectable from the perspective of the individual. This qualification is not always co-extensive with what is most beneficial, as the individual also has other concerns than what is most beneficial. The problem with a straightforward comparison of end states is that it does not take the perspective of the individual into account. This is to aggregate across lives, instead of within lives. As the discussion above revealed, this is precisely the kind of aggregation contractualism rules out and it can therefore explain why a principle proposing plural votes can reasonably be rejected.

However, perhaps this is not enough to reject plural votes. On one reading of the contractualist re-formulation above it might be argued that the proposed principle

appeals to the kind of reason an individual may have because plural votes benefit even the individual who does not have them. That is, Arneson might argue in favour of plural votes on the grounds that such a scheme is justifiable even to those deprived of plural votes because those individuals will benefit from living in a society where democratic decisions conform more closely to justice. Interpreted in this way, it seems that plural votes cannot be so easily rejected, because it can be argued that it aggregates within lives and not merely across lives. In other words, plural votes are justifiable to others, even to those who will be without them. Nevertheless, what contractualism 'takes as fundamental is not what people actually think or want, but what they have reason to want' (Scanlon: 1998: 341). Thus, the question is therefore: do people have reason to want plural votes?

A system of plural votes is rejectable also because the procedures themselves are unfair. Scanlon holds that 'a person could reasonably reject a principle on the grounds that it treated him or her unfairly... even if this treatment did not make the person worse off' (Scanlon: 1998: 229). If a system of plural votes leads to a more just society, the well-being of the persons denied plural votes is likely to improve, as it is a good for everyone to live in a just society. However, the means for bringing about justice treats some individuals unfairly, and those treated in this way have good reasons to reject such treatment. The unfairness of plural votes is that political power is distributed unequally, which is not to treat persons as equals.

This brief discussion shows that contractualism is able to derive the right answers in relation to consequentialism at least in the cases of judicial review and plural voting. In these cases, contractualism gives proper weight to both consequential concerns and the interests of persons. Contractualism asks how judicial review and plural votes affect the individuals within the scheme in order to assess their merits and de-merits. This example is significant because judicial review is controversial because of its potential conflict with equal political rights, and the comparison with plural voting suggests even more that the idea of judicial review is dubious from the perspective of democracy. Instead of showing how both plural voting and judicial review are rejectable, contractualism is able to distinguish between the two schemes and arrive at plausible conclusions. The conclusion is that consequentialist intuitions are plausible in the case of judicial review, but not in the case of plural voting. This, of course, does not fully answer Pettit's objection that contractualism rules out consequentialist intuitions when they seem plausible. Rather it suggests that

contractualism is a sophisticated theory that can yield plausible answers to questions of a consequentialist character.

To sum up the discussion in this section: the weak interpretation of justice as impartiality and contractualism can be maintained because the objection that contractualism rules out consequentialist intuitions when plausible can be rejected. Instead, the discussion in this section shows that it is possible to combine democracy and fundamental rights without conflict. This is an important, and controversial, insight. One of the most important aims of the next three chapters is to see what implications a combination of these two features yields. A conception of political justice based on these two features is controversial among both political and democratic theorists, and it is still far from sure that the implications this approach yields are sustainable, even if they seem to yield plausible answers in cases of consequentialism and aggregation.

## **5. Concluding Remarks**

Section one argued that Scanlonian contractualism and justice as impartiality have an overlapping understanding of reasons and emphasize the *a priori* approach to justice. This undermines the strong substantive implications present in, for example, CE and WSJM. In sections two and three, I emphasized the plausibility of this understanding by discussing how a distinction between what justice requires and what is consistent with justice points out how the strong and weak elements in liberalism can be ordered so as not to conflict. It is important to notice that the balance between convergence and divergence of reason that follows from this interpretation avoids the problems associated with politics as coordination, but does not rely on the many controversial elements associated with politics as consensus. This interpretation of how to balance convergence and divergence of reason is an attempt to satisfy the liberal principle of legitimacy and aims to offer a political order justifiable to all citizens in conditions of pluralism. The main conclusion from this chapter is that the weak understanding of reason is strengthened as a plausible interpretation of what justice requires where what justice requires is limited to fundamental rights and a democratic order.

All these points also have important implications for the scope of contractualism. Effectively, they mean that the weak interpretation of reason also describes the limits of contractualism. What this means is that contractualism on this account is circumscribed to the derivation of fundamental rights and to the



justification of a democratic order. Contractualism can be interpreted more expansively and with a wider scope, but in a political context like the one surrounding liberal constitutionalism – where pluralism and liberal legitimacy are crucial premises for political theorizing – it is neither desirable nor possible to derive a much stronger understanding of contractualism.

After arriving at this conclusion about how to understand reason in liberal constitutionalism, we have an answer to the question asked in the Introduction about the role of reason in liberal constitutional thought. This answer also serves as a starting point for developing a liberal constitutional framework, and for answering the two next questions identified in the Introduction. They concerned what democratic order liberal constitutionalism required and how to square democracy with substantive rights. The next chapter aims to show what a democratic order based on this understanding of reason will look like.

## CHAPTER FIVE

### Democracy Between Aggregation and Deliberation

*Votes count, but resources decide.*

Stein Rokkan<sup>21</sup>

Votes matter in democracies, but often power and resources matter more. It is not unusual to observe that the democratic process is tainted by powerful groups using their superior resources to determine political outcomes to their own advantage. One of the central ideas informing justice as impartiality is precisely the thought that resources ought not determine the outcome of the political process. Instead, a central thesis is that of equal concern for the interests of the different groups of society. An unequal distribution of resources should not be allowed to influence the democratic process. For a democracy to be justifiable, this requirement must be satisfied.

The challenge for a theory of democracy is that it must be both morally justifiable, and serve as a framework for a workable political order. An unjustifiable democratic order lacks legitimacy, and the unfairness of the system can gradually undermine the democratic order. Overly demanding procedures leave democracy unable to respond adequately to urgent and pressing political problems, and they ultimately undermine the efficiency of democracy by comparison with alternative forms of government. These competing demands put democratic theories to a hard, but necessary test.

In this chapter, I start by describing three ideals of liberal democracy. I then apply these ideals to two influential theories of democracy – pluralism and deliberative democracy – and analyse how these theories realize liberal constitutional ideals, and how they accommodate the competing ideals referred to above. In the final section, I discuss the epistemic value, and the scope, of democracy.

#### 1. Three Ideals of Liberal Democracy

We have seen (perhaps unsurprisingly) that justice requires democracy, but we have yet to see what justice requires of democracy. In this section, I will suggest some

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<sup>21</sup> Norway: *Numerical Democracy and Corporate Pluralism*, p. 105.

answers to this question. What justice requires from democracy can be summarized under three subheadings. First, justice requires from a political order that it reflect the moral equality that follows from the original position, which eventually justifies equal political rights. Second, impartial procedures and state neutrality are required to ensure a legitimate political process. Third, democracy is a form of government that enhances and gives expression to the citizens' liberty. That means the protection of liberal freedoms, like the ones included in the constitutional essentials discussed in chapter three, and ensuring the ideal of popular sovereignty. This section seeks to elaborate these three ideals of liberal constitutional democracy.

To start with the question of why justice requires equal political rights. In the Scanlonian original position, no one would accept less than equal political rights. The underlying idea is the assumption of the equal moral worth of persons. Moving from this assumption to politics 'it is hard to see why anybody of sound mind should be asked to accept less than equal political rights' (Barry: 1995: 109). Given the equal moral worth of the person, it is unreasonable to propose inferior rights for certain parts of the demos, and equally unreasonable for those who are offered inferior rights to accept them. Equal political rights here means that every adult of sound mind ought to have the same rights to vote and to be elected, and to participate in political activity. Also included are essential rights such as freedom of speech and freedom of association. In Rawls' words, it requires 'that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply' (Rawls: 1999a: 194). Despite the fact that the idea of equal political rights is deeply embedded in contemporary democratic thinking to the extent that it almost is superfluous to discuss it in detail, it is clear that this ideal is easily guaranteed formally, but is harder to realize in actual democratic practice. As Rawls observes 'historically one of the main defects of constitutional government has been the failure to insure the fair value of political liberty. The necessary corrective steps have not been taken, indeed, they never seem to have been seriously entertained' (Rawls: 1999a: 198). Because of the central role political equality plays in justifying democracy it is essential that it plays a crucial role in shaping a liberal constitutional political order.

Second, justice requires that the democratic process is impartial. This requirement is related to political equality in an important way. If the political process is partial and offers certain parts of the electorate advantages or increased influence,

this represent a breach with political equality, as political power is then unequally distributed among the electorate. This seriously taints the political process and undermines the legitimacy of the political system because those who find themselves at the losing end have good reason to reject both a biased political process and the outcomes of such a process. Moreover, there is good reason to remember that ‘even if people are unhappy with a decision, they are much more likely to accept it if they perceive it as having been taken in a fair way’ (Barry: 1995: 111). Thus, an important element of impartiality is not only that the outcome matters, but also that it came about in a fair way.

Impartial procedures are built around two principles. The first is that the political process ought to be constructed by fair and just procedures and, second, that the state ought to be impartial between different conceptions of the good and competing interests such as, for example, the competing interests between unions and employers. Fair and just procedures means a system honouring equal political rights where, for example, each vote has roughly the same importance, or more precisely a political system where wealth and social background do not affect the weight of the vote. Furthermore, elections must be fair and free, and held at regular intervals. A second important element is that the state is impartial between, for example, different religions and other competing interests in society. This means that the constitution and the political system do not favour certain ethnicities, religions and social backgrounds (among other factors). These factors are not relevant when deciding upon public policy. The basic idea of impartiality is that these concerns ought not to be taken into account when forming public policy or new laws. Furthermore, impartiality does not mean that the outcomes of the democratic process necessarily have to be impartial with respect to everyone affected by a policy or law, i.e., burdens and benefits may affect different groups of the population differently (I will discuss this issue further in chapter seven). Instead, what it requires is that the process leading up to a decision is impartial so that all sides have a chance to influence the outcome. Importantly, the outcomes cannot violate fundamental civil rights such as, for example, freedom of religion.

Now, this takes us to the third requirement, liberty. This requirement has two sides, one negative and one positive. I will start with the negative side, which is strongly related to how the distinction between first-order and second-order impartiality restricts the scope of politics. As this distinction has been interpreted in

this thesis it leaves a wide scope for individual discretion to organize one's life in the way one sees best. This concern has perhaps received the clearest expression in Mill's words:

But neither one person, nor any number of persons, is warranted in saying to another creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it... The interference of society to overrule his judgement and purposes in what only regards himself, must be grounded on general presumptions... In the conduct of human beings towards one another, it is necessary that general rules should for the most part be observed, in order that people may know what they have to expect; but in each person's own concerns, his individual spontaneity is entitled free exercise... All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem is good.

(Mill: 1991 [1859]: 84-85)

As a way of ensuring individual discretion over the course of one's life, the individual is equipped with a set of civil rights aiming to protect basic interests such as the integrity of the person, freedom of religion, and so on. These rights are outside the reach of ordinary politics, and they protect the individual against oppressive and intrusive laws and policies. This aspect I call the negative side of liberty as it seeks to protect the individual against infringements of basic interests and the potential tyranny of the majority. Also, it ensures, as Mill was keen to emphasize, the importance of ensuring that individuals can live in accordance with their own ideas about what is right and wrong (although within certain limits). The protection of the individual against the tyranny of the majority has been a longstanding concern for liberalism. In liberal constitutionalism, this protection is achieved through the set of fundamental civil rights.

The positive side of how liberty relates to democracy is through the importance of popular sovereignty. The idea is that the people are the final moral authority and an important aspect of liberty is to live under laws enacted by the people themselves. The demos are the author of the laws under which they live. Equal political rights give every adult of sound mind an equal share of political power and an equal opportunity to participate in politics. The exercise of political rights is an important aspect of being free in the sense that one has influence over the outcome of elections. In large-scale modern democracies one vote has minimal influence, and the exercise of this right is

highly indirect through the system of representative democracy. Still, this right makes the people the ultimate authority of political power as the power vested in the hands of representatives is derived from the people, and thus the people are in some sense responsible for the laws and policies enacted by the parliament.

This section has outlined three ideals of liberal democracy: equal political rights, impartiality, and liberty. These are the principal ideals of a constitutional liberal democracy. With these ideals in place a democratic society will satisfy the requirements of liberal justice. Over the next two sections I will discuss two influential types of democratic theories and ask how they fit with the liberal constitutional democratic ideal discussed in this section.

## **2. Democracy as Process**

The industrial revolution led not only to dramatic technological and economic changes in most Western societies, but also had profound political implications. For the most part these implications put into doubt the plausibility of realizing the ideals of liberal democracy articulated above. Perhaps the strongest articulations of these councils of despair over the prospect of democracy are expressed in the writings of Max Weber and Joseph Schumpeter. Briefly stated, Weber is concerned with how modern industrialized states are more and more governed by a rationalized bureaucracy which undermines the possibility for citizens to flourish as free and equal individuals. This is a threat to the ideals of liberal democracy, not only created by a powerful state, but also from private corporations getting increasingly powerful and dominating individuals in modern life (Weber: 1978). Democracy was said by Weber to be a counterweight to the dominating role of the state and corporations. On his view, democracy served as a training ground for breeding strong leaders who could balance the power of the state and capital. Consequently, democracy on this view has a strongly elitist character in that it emphasizes how democratic leaders can counter the power of state and capital. The role of the people here plays an inferior role and politics is centred around how different elites work together or against each other. Even if democracy can counter-balance some of the challenges posed by the state and capital, it is disappointing for the prospects of realizing political equality, impartiality and liberty under modern conditions.

Schumpeter was equally pessimistic about the prospects of democracy and took issue with how passive and politically paralyzed the electorate were in many

mass-democracies. The masses could be manipulated through targeted advertising and sophisticated marketing, according to Schumpeter. He also emphasized how great a distance there is between ordinary citizens' lives and the life of politics. Ultimately, on his view, democracy is merely a procedure to change government and to avoid corruption and unsuitable leaders (Schumpeter: 1976). As with Weber, the prospects for realizing the ideals of liberal democracy must be said to be meagre if Schumpeter's account of democracy is accurate.

Both these views have exercised great influence on democratic thinking over the last decades (Held: 2006: 125). Unsurprisingly, these bleak prospects for democracy provoked responses that challenged both their empirical claims about the poor prospects of democracy under modern conditions, and their normative ambitions of thinking of democracy in limited and elitist terms. The school of thought that presented the most penetrating critique of elitist competitive democracy was the widely influential group of pluralist theorists (Held: 2006). Among these theorists, perhaps the most influential and sophisticated was Robert A. Dahl who argued that the governing elites consisted of numerous diverse groups who between them bargained over political power (Dahl: 1956). Furthermore, pluralism held that the plurality of interest groups and other representatives adequately represented the different and diverse interests in society.

Based on these findings, Dahl articulated a theory of democracy – one that still enjoys widespread influence – around the idea of democracy as a procedure and process. The essence of Dahl's theory can be expressed in the following five general requirements:

- (1) Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.
- (2) At the decisive stage of collective decision-making, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. In determining outcomes at the decisive stage these choices, and only these choices, must be taken into account.

(3) Each citizen ought to have adequate and equal opportunities for discovering and validating (within the time permitted by the need for a decision) the choice on the matter to be decided that would best serve the citizen's interests.

(4) The demos must have the exclusive opportunity to decide how matters are to be placed on the agenda and which matters that are to be decided by means of the democratic process.

(5) The demos must include all adult members of the association except transients and persons proved to be mentally defective.

(Summarizing Dahl: 1989: 106-134)

A process following these requirements can legitimately be called democratic, according to Dahl. These requirements emphasize the importance of political equality because it includes all adult members of sound mind and emphasizes the importance of equal opportunities to influence the political process. This notion of equality also goes a long way towards securing impartial procedures. In these respects democracy as process satisfies the liberal ideals of equality and impartiality.

However, on two important counts democracy as process departs from liberal democracy. The first departure is that democracy as process rejects fundamental (pre-political) rights. Second, democracy as process relies on a controversial understanding of majority-rule because of its reliance on utility-maximization achieved by aggregating preferences. When these differences are taken into account, we can see that democracy as process falls short of satisfying liberal democracy and an alternative model for a legitimate political order must be sought. I will now briefly discuss these two problematic features with pluralism from the perspective of liberal constitutionalism.

To start with the issue of fundamental rights, according to (4) above the people have an exclusive right to decide which questions to put on the political agenda. This rules out from the outset a set of individual rights that cannot be altered through democratic decision-making. Dahl believes such rights undermine the sovereignty of the demos and calls it a form of 'guardianship' that expresses the view that some theory or positions have an exclusive access to what is right or true (Dahl: 1989: ch. 6). Although Dahl ultimately endorses the idea of a 'quasi-guardianship', which limits the set of individual rights to those necessary for the democratic process itself (Dahl: 1989: ch. 13), this concession falls short of guaranteeing those fundamental civil rights, such as freedom of religion, the integrity of the person and so on, prescribed by



liberal democracy. Therefore, from the perspective of liberal constitutionalism this feature of Dahlsian pluralism must be rejected. Nevertheless, the issue raised regarding guardianship is of great importance and the next chapter will discuss in more detail how liberal constitutionalism seeks to combine fundamental rights and democracy without constituting a form of guardianship.

Because pluralism rejects important liberal civil rights, majority rule plays a dominating role in this theory of democracy. Dahl endorses four principal arguments in favour of majority rule:

(1) Maximizing self-determination. Majority rule maximizes the numbers of citizens who live under their own laws, which is an important principle for many understandings of democracy.

(2) Majority rule is the consequence of reasonable requirements. A democratic decision rule ought to be decisive, provide anonymity, neutrality with respect to the alternatives and that the decision rule ought to be positively responsive. Only majority rule satisfies these four criteria.

(3) Majority rule is more likely to produce correct decisions. This argument relies on Condorcet and states that if a person is greater than 51% likely to make the correct decision, then the probability that the majority makes the right decision increases as the size of the electorate increases.

(4) Majority rule maximizes utility, because it is plausible to assume that by applying majority rule, this will on average maximize the benefits to the demos as it is assumed that the majority will receive certain gains that outweigh the losses felt by the losing minority.

(Summarizing Dahl: 1989: 135-153)

Although Dahl pays attention to self-determination in (1), the emphasis on utility-maximization, and the way the utilitarian framework drives the argument, means that democracy is in the end merely an aggregation of the voters' preferences. Thus, even if the argument pays attention to the importance of self-determination, this is undermined by the emphasis on utility.

Eventually, majority rule aggregates citizens' preferences and makes democratic decision-making into a process where numbers matter more than arguments. The formal conception of pluralism emphasizes the importance of equal opportunities to influence the process. However, when democracy is seen as a device for maximizing utility the theory does not take seriously the view that an important

aspect of public decision-making is about what the demos (or at least the majority) think is right, rather than merely the possible utilities derived from aggregating preferences. We see from this discussion of the role of individual rights and the role of majority-rule in pluralism that these two features are at odds with the understanding of democracy found in justice as impartiality.

Nonetheless, there is one attractive feature of pluralism that liberal constitutionalism seeks to incorporate into its understanding of democracy. This is pluralism's rejection of the idea that democratic politics can reveal the common good. This feature is not surprising since pluralism emphasizes how society is dominated by competing interests advanced by different elites. Given diverse and plural societies, Dahl rhetorically asks, how can citizens experience the common good, and what is the substantive content of the common good? (Dahl: 1989: 298). Dahl doubts that these questions can be answered adequately in societies characterised by diversity and pluralism. Instead, he suggests an alternative; namely, the common good as 'process' (1989: ch. 21). This idea suggests that the common good is not the substantive outcome of democratic decision-making, but instead the common good is the process of democratic decision-making itself.

In diverse societies there is often disagreement about what is the right decision to make. In such an environment, the process of democratic decision-making represents a reasonable solution to how such disagreement can be resolved. Therefore, Dahl argues, the citizens agree on procedures for public decision-making and democracy itself constitutes the common good. The rejection of a strong notion of the common good is a plausible and realistic condition in diverse and plural societies. What is particularly valuable is that it points out how a working democratic order is possible without relying on a contentious conception of the common good. Thus, Dahl's alternative is an example of the necessary minimum for a working democratic order. Justice as impartiality endorses a similar notion of the role of the common good, where the democratic order itself is viewed as the common good, instead of the actual outcomes of democratic decision-making.

The attraction of pluralism is that it offers a reply to Weber's and Schumpeter's view that under modern conditions democracy is dysfunctional. Through different group interests, the interests of most citizens are adequately represented and it suggests that even if politics is mainly carried out by relatively small elites, these elites are fragmented and do not undermine the liberal ideals of

political equality, impartiality and liberty. Despite its attractiveness, we have seen that its strong emphasis on democracy as utility maximizing and its hostility towards fundamental rights causes problems for incorporating this understanding of democracy into a liberal constitutionalist framework. The fact that the theory justifies an elitist democracy, indicates that it does not pay enough attention to the quality of the democratic process. Furthermore, it seems inadequate to ensure that political debate focuses on arguments and the reasons for and against different alternatives. Instead, pluralism appeals to citizens' preferences rather than the substantive reasons and arguments in each case. Before discussing in more detail the merits and demerits of pluralism (which will be done in the final section) I will in the next section assess the merits of a democratic order that seeks to improve the quality of the democratic process by emphasizing the importance of deliberation in politics.

### **3. Deliberative Democracy**

Although, deliberative democracy has been formulated in a variety of different versions my discussion of this type of democracy will mainly focus on Joshua Cohen's work. Cohen emphasizes many of the features typical of deliberative democracy such as a concern for representation and participation, and the idea of a search for a common good. An interesting point related to the focus of this thesis is that his theoretical foundation is derived from the two dominant philosophical sources of this strand of democratic thinking: Jürgen Habermas and John Rawls. This mixed origin makes Cohen's work particularly interesting when considering the relationship between justice and democracy.

Deliberative democracy, as formulated by Cohen, is based on the following five ideas:

- (1) A deliberative democracy is an ongoing and independent association, whose members expect it to continue into the indefinite future.
- (2) The members of the association share (and it is common knowledge that they share) the view that the appropriate terms of association provide a framework for or are the results of their deliberation.
- (3) A deliberative democracy is a pluralistic association. The members have diverse preferences, convictions and ideals concerning the conduct of their own lives.

(4) Because the members of a democratic association regard deliberative procedures as the source of *legitimacy*, it is important to them that the terms of their association not merely *be* the results of their deliberation, but also be *manifest* to them as such.

(5) The members recognize one another as having deliberative capacities, i.e. the capacities required for entering into a public exchange of reasons and for acting on the result of such public reasoning.

(Cohen: 2002: 91-92, original emphasis)

In addition to this formal framework, deliberative democracy focuses ‘on the common good’, where ‘the interests, aims and ideals that comprise the common good are those that survive deliberation, interests that, on public reflection, we think it legitimate to appeal to in making claims on social resources’ (Cohen: 2002: 95). The foundation for these statements is to be found in the liberalism of John Rawls. More specifically, the only valid demands in the political sphere are those ‘argued for openly by reference to a conception of public good’ (Rawls quoted in Cohen: 2002: 88). Deliberative democracy also ‘aims to arrive at a rationally motivated *consensus*’, if consensus cannot be reached, ‘then deliberation concludes with voting, subject to some form of majority rule’ (Cohen: 2002: 93, original emphasis).

Furthermore, deliberative democracy is guided by the idea that only the force of the better argument has weight (Cohen: 2002: 93). If the better argument is endorsed, the quality of the decision and democracy is secured. If this is correct and the common good can be equated with the better argument, then it is reasonable that the common good trumps the losing minority’s conception of the good.

However, the problem with this position is that it reflects a highly idealistic understanding of the character of political decision-making. It assumes that the outcomes of political decision-making constitute a common good for the *demos*. In reality, it is difficult to envision such a conception of political decision-making. Rather, many political issues are disputes over the weight of different moral values. Consider, briefly, abortion: different conceptions of the good provide different answers to what is the right decision on this issue. It is not a decision where arguments alone provide a conclusive answer. The answer is given by the moral weight given to the arguments. For example, as briefly mentioned in the previous chapter, Rawls holds that even if people have access to the same information disagreements are possible (or

even likely to occur) because people attach different weight to different arguments (Rawls: 1996: 54). Forging a strong link between reasons and the common good has two consequences. Firstly, it puts members who disagree in a difficult moral dilemma. They have to choose between their own convictions and what the association has decided upon as the common good. Secondly, it implicitly states that those who are not swayed by a majority decision are unreasonable because they are not swayed by the better argument.

By emphasizing how politics is about the common good, deliberative democracy effectively avoids the conclusion that politics is merely about aggregating preferences and maximizing utility. Instead, reason is doing the hard work. The problem is that equally reasonable conceptions of the good will yield different answers to many political questions. Consider again a democratic association discussing abortion: Christians and, for example, non-believers are likely to reach different answers on this issue. That does not mean that one of these groups is automatically unreasonable. Labelling the losing side as unreasonable can be seen as an unintended side-effect of Cohen's theory of deliberative democracy. Putting this strong emphasis on reason and the common good creates problems it is difficult for deliberative democracy to resolve without giving up either the idea that the members endorse different conceptions of the good, or the strong conception of the common good.

The reliance on both the idea that the members of the demos endorse different conceptions of the good and that the demos is focused around a strong conception of the common good implies that the range of reasons permissible in the public domain is limited. This is because, if public reason is to be acceptable to all, it cannot originate from within a specific conception of the good. Deliberative democracy is committed to a strong conception of the common good because of the special status the common good has in the theory. Cohen's theory of deliberative democracy considers the outcome of the deliberative process as the common good. A controversial consequence of this is that even those who disagree with the outcome must acknowledge it as the common good.

The solution to this problem, I suggest, is a weaker conception of the common good. Instead of understanding the outcome of the deliberative process as the common good, the democratic system and the deliberative process itself should constitute the common good along the lines discussed in the previous section. This view leaves room for invoking a wider range of reasons, and avoids the problem of labelling reasonable

conceptions of the good (for example, one or other of Christianity and Atheism) as unreasonable. On this model, the outcome of the deliberation is not constituted as the common good, but as what the majority think is the right decision. This condition is weak enough to avoid the unintended side-effect associated with Cohen's theory, but still strong enough to ensure stability and a lasting democratic order. That the political process ought to centre on reasons and the better arguments is still acknowledged. The crucial difference is that the range of acceptable reasons is extended, and that the outcome no longer constitutes the common good. Given the existence of pluralism, and a desire to let reasons and arguments be influential, weakening the understanding of the common good and the role of reason means that the aims of deliberative democracy are still achievable, but without the undesirable implications that follow from Cohen's more substantive account.

However, there is a second problem associated with deliberative democracy from the perspective of liberal constitutionalism. That is the claim that 'there is of course no reason to expect as a general matter that the preconditions for deliberative democracy will respect familiar institutional boundaries between 'private' and 'public' and will all pertain to the public arena' (Cohen: 2002: 97). Cohen does not elaborate on this claim apart from briefly mentioning that re-distribution of wealth might be necessary to ensure equality between the members of the association. Re-distribution of wealth to ensure equality is not problematic for a liberal constitutional conception of democracy as a principle. What is worrying from the perspective of justice as impartiality is that deliberative democracy threatens the critical distinction between first-order and second-order impartiality. The worry is that deliberative democracy, by not respecting a distinction between private and public, endorses a model of democracy with fluid boundaries for the limits of public decision-making. This opens the way for potentially intrusive and detailed policies that regulate citizens' lives in great detail. From the Scanlonian original position such policies can be reasonably rejected, and the general civil and political rights granted by liberalism aim precisely to protect against the implementation of such schemes.

Clearly, Cohen does not have in mind a political system that is totalitarian or oppressive, and it might be objected that as long as a certain principle or policy is invoked as the outcome of deliberation, it is legitimate. The members ought to be free to decide upon more detailed and intrusive policies if they believe those policies to be in the common good. Furthermore, Cohen thinks this move is legitimate and that it

will not lead to oppressive practices because the procedures of deliberation will focus on reason and argument. Hence, if the best argument sways the majority, the outcome is the common good and will not go against the interests of the citizens individually.

The obvious problem with putting this much faith in reason is that it supposes that deliberative democracy cannot err, or make wrong decisions. That is to value human reason and citizens' ability to deliberate too optimistically. Human reasoning is bound to fail and to make mistakes. Partly for this reason, justice as impartiality defends a set of rights to protect against potentially oppressive policies that may emerge from deliberation.

Against this, Cohen can argue, first, that it is not just deliberative democracy that relies on infallibilism, because when liberals claim to know the basic interests of the individual, and how to protect them, it too claims certainty over an inherently uncertain matter. Second, Cohen can argue that the fact of equality between the members of the democratic association will ensure that the policies chosen will not be oppressive.

To start with the first reply: for an outcome to be legitimate, deliberative democracy seeks to construct an ideal speech situation, where deliberation takes place on equal terms. If such an ideal situation can be constructed, then the outcome is bound to be legitimate. In principle, justice as impartiality accepts that claim, but holds that constructing such an idealized situation for political deliberation is highly unrealistic. Therefore, it is instead necessary to re-create a hypothetical situation where actual claims and principles can be tested. For justice as impartiality, the Scanlonian original position serves as an approximation that re-creates this ideal. More precisely, the idea is captured in the following way:

Let us suppose that a certain positive morality is in place in society and that, because of its unequal impact on different sections of the community (men and women, blacks and whites, for example), it could reasonably be rejected in a Scanlonian original position. If all the members of the society were debating what content their positive morality should have, this one would not emerge as an agreed outcome. But since the occasion for such a debate never arises in real life, a positive morality that would not survive a process of Scanlonian collective decision-making may nevertheless prove very resistant to modification.

(Barry: 1995: 209)

The reasoning behind the Scanlonian original position has the advantage that it is possible to derive some ground-rules for how the political system ought to operate and to treat citizens. Hypothetical reasoning like this is a more secure and efficient procedure to ensure that the outcomes are reasonable (not rejectable). One can reason hypothetically at any time, but creating similar situations in real democracies can only be done at great cost, if at all.

Although the hypothetical reasoning behind contractualism might appear idealized and unrealistic in a way that renders it liable to similar criticisms to those made above of deliberative democracy, it is important to notice that the Scanlonian original position differs from deliberative democracy in three significant ways. First, it does not prescribe any first-order principles, but is instead describing the conditions that must be satisfied to create non-rejectable outcomes. This feature acknowledges the importance of taking social and historical contingencies into account, so that different societies can choose different institutions and endorse different positive moralities, and still be considered just. Second, contractualism only endorses procedures, and does not claim that the outcomes of these procedures represent the common good in any strong sense. Finally, third, contractualism seeks to defend a weaker notion of reason than is found in theories of deliberative democracy.

These three additional features of contractualism show that it relies on weaker assumptions than those that ground deliberative democracy. In the next chapter I will discuss the relationship between contractualism and deliberative democracy in more detail and defend a limited analogy between the two views. As part of that discussion I will also suggest that the scope of contractualism is limited, but immensely important.

The crucial difference here is that deliberative democracy does not acknowledge any precise limits on how far reaching are the policies that can be endorsed. It relies on an idealistic and unrealistic assumption of political decision-making and the possibilities of creating an ideal situation for political deliberation. Justice as impartiality holds that the basic rights and liberties it defends cannot be rejected because almost any conception of the good will go better with these in place (Barry: 1995: 86-88). The defence of such rights represents an important advantage of justice as impartiality.

Recall that the second reply available to Cohen mentioned above was that the equality of the participants in deliberative procedures would guarantee that the outcomes of deliberative democracy would not be oppressive. Although equality is



one of the foundations of liberal constitutionalism it is difficult from a liberal constitutionalist perspective to see how equality can be realized without formally securing basic rights and liberties. An obvious example is the role justice as impartiality ascribes to the interests of the weakest members of society. Justice as impartiality holds that a moral principle can only be accepted if no affected party can reasonably reject its implementation. However, although this applies to all relevant parties, we have reason to pay special attention to those who do worst under a principle because they have the strongest reasons to reject it. In the end, if consensus cannot be reached, deliberative democracy resorts to majority rule. In order to protect minority groups who might lose out in a vote, basic liberal rights seek to ensure that those who do worst under some policy do not suffer any injustice and, in particular do not do worse just so that the majority can do better. With a set of liberal rights in place, this might increase the legitimacy of democracy and it might be easier for the losing minority to accept a defeat, as they know their basic interests are always guaranteed. Thus, in fact, the guarantees offered by justice as impartiality actually support democratic legitimacy rather than undermining it.

This points to an important implication of justice. Ultimately, liberal democracy provides strong protection for the rights and interests of those who find themselves in the minority at moments of democratic decision. The important insight of this position is that legitimacy is not only dependent upon making the political process “more and more” democratic, but also upon how the political process is constrained. With these constraints in place one can expect more wholehearted support from marginal and minority groups for the democratic process as not only are the interests of the majority secured but also those who find themselves on the losing side of democratic decisions. Thus, the objection against liberal democracy made by many democrats such as, for example, Dahl that liberal rights are undemocratic and damage the legitimacy of democracy is undermined. Because these rights play an important role in protecting those who are likely to constitute the minority, liberal rights can play an important role in justifying and legitimating democracy.

The aim of the present discussion has not been to reject deliberative democracy as a theory wholesale. Instead, the aim has been to provide a critical assessment of some of its central tenets which relate to justice as impartiality, and to draw attention to where deliberative democracy departs from liberal democracy. I believe the two main problems raised in this section are issues deliberative democrats ought to take

seriously, but at the same time, liberal democracy finds many of the points offered through the formal framework to be attractive starting places for democratic theorizing. The main point is that liberal democracy draws on elements from both deliberative democracy and Dahl's pluralistic theory of democracy, and I will now in the next and final section of this chapter discuss how these two approaches to democracy offer both attractive and problematic features for liberal democracy.

#### **4. Defining the Scope of Democracy**

The discussion in the two previous sections has given us some idea of how the scope of democracy has been defined by two of the currently most influential theories of democracy. Neither of these theories seems entirely adequate from a liberal perspective. In particular, two issues need to be defined more clearly. The first is the status of democratic decision-making. This issue is raised by both pluralism and deliberative democracy. In different ways both these theories claim that the outcomes of democratic decision-making enjoy a special status. Dahl's pluralism claims that democratic decision-making has a high probability of making correct decisions. In Cohen's deliberative theory the outcomes of democratic decision-making constitute the common good in a relatively strong sense. A second issue concerns the scope of democratic decision-making. It is not clear which institutions are included in democratic decision-making. Does democracy require, for example, workplace democracy, or that religious and voluntary associations ought to be governed democratically, or is democracy restricted to the political process? The purpose of this section is to answer these questions and thus to arrive at a clearer understanding of the scope of democracy.

Starting with the status of democracy, in diverse and pluralistic societies it is difficult to attach a strong epistemic value to the outcomes of democratic decision-making. Epistemic value here means that democracy is a method for decision-making that is able through deliberation to improve the quality of the decisions compared with alternative forms of government. I will now expand on why only a weak sense of epistemic value can be attached to contemporary accounts of democracy. The strongest justifiable formulation of the epistemic value of democracy, I argue, is to hold that the outcome of democratic decision-making is an expression of what the

majority think is the right decision.<sup>22</sup> This does not mean that the outcome must be endorsed as an expression of the truth about the matter at hand, or even that it needs to be endorsed as ‘correct’. Furthermore, this weaker understanding of the epistemic value of democracy rejects the idea of democracy as utility-maximization since it focuses only on what the majority think of as right, and not on the utility they attach to the outcome. Thus, this formulation also avoids the complex issue of the relationship between utility-maximization and how different conceptions of the good can translate their views into an inter-personal utility calculus to compare the utilities attached to different proposals.

A second point to mention in relation to the epistemic status of democracy is that in actual democratic politics a newly elected government often repudiates the decisions made by its predecessors. If democratic decision-making led to qualitatively superior decisions it would put democracy in a strange light. Because, if, for example, a newly elected government changes the economic policy from a socialistic oriented to a market-oriented policy, and both policies are invoked through the democratic process, then the implication of this is that both the opposing policies are endorsed by democracy and are in some sense ‘quality assured’. Famously, Margaret Thatcher changed the United Kingdom’s economic policy dramatically when she gained power in 1979. Both the economic policies of her predecessor and her own economic policy were enacted by parliament following ‘free and fair’ elections, and it would be strange to claim that each of these policies was qualitatively the best at the time of implementation. It is a more sensible position to maintain that democratic decision-making expresses what shifting majorities think of as right at a certain time, not that the quality of the outcomes are necessarily ensured.

Against my weak understanding of the epistemic status of democracy it might be claimed that it is not inconsistent to hold that two incompatible policies democratically enacted can both be said to express the best decision because they were enacted at different times and under different conditions. Perhaps each was correct at the time. This is, of course, conceptually possible, but it is of only limited application. The example of the shift from a socialistic policy to a more market-oriented policy represents a shift not of emphasis, but of a more principled kind. It is odd to think that

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<sup>22</sup> This view is nonetheless significantly weaker than David Estlund’s (2008) recent theory of epistemic proceduralism that states that the process of democratic decision-making improves the quality of the outcomes. According to Estlund, this view does not involve the claim that democratic decision-making arrives at the truth or at objectively correct outcomes.

in the United Kingdom socialism was correct before 1979, while wrong in principle after 1979. More principled shifts of policy, such as the one represented by the Thatcher take-over in the UK in 1979, warn us against attaching any strong epistemic status to the process of democratic decision-making. The weak understanding of the epistemic status of democracy avoids taking a position on such questions, and this solution is more in line with the idea that justice as impartiality offers a framework for making public decisions when people disagree strongly over what is the right choice and the right decision to make.

Deliberative democrats may object to this argument and say that if the democratic process is carried out in accordance with the ideals of deliberative democracy the situation will be different. If the process is entirely impartial and properly represents the various views on the issue, and citizens approach the issue in an impartial and reasonable way, then it is possible to arrive at democratic decisions that express the truth. In addition, they might argue that it is wrong to compare the decisions made in actual democracies tainted by class-interests (as in the UK perhaps) and poor procedures (as, again, in the UK) with the ideals of deliberative democracy and conclude that deliberative democracy fails.

My reply to this argument is that given diversity and pluralism it is difficult to see how consensus is either possible or desirable in the strong sense suggested by Cohen's deliberative theory. Contractualists would agree that if complete equality and impartiality were possible, then there would be no need for a set of fundamental rights, but since it is highly implausible to realize these circumstances, contractualism offers an alternative that is more practicable. To create the ideal of deliberation demanded by deliberative democrats seems unrealistic from the perspective of liberal constitutionalism. Because of the difficulties involved in realizing these ideals, liberal constitutionalists hold that there is room for thinking hypothetically about what it would be reasonable to choose in a situation where these conditions were present. Hypothetical reasoning helps in articulating the necessary principles and ground-rules necessary to realize an impartial and equal political order. Liberal constitutionalists and deliberative democrats thus share some of the same ideals: a political order based on equality and impartiality, but they disagree with respect to the extent to which such a political order can be realized (or not).

This does not mean that the procedures of deliberative democracy are not important. On the contrary, they are important in ensuring political equality and

impartiality. They are crucial in ensuring that all have equal opportunities to voice their concern and influence the democratic process. These procedures also help to ensure that the process is, as far as possible, impartial between both different conceptions of the good and opposing interests. Procedures ensuring these goals play an important role in legitimizing the democratic system and, as pointed out earlier, a fair and impartial process makes it easier for the losing party to accept the outcome.

However, in the end, there are limitations on how far the ideals can be implemented in actual democracies and thus there is scope for the hypothetical reasoning found in contractualism when the actual deliberations of democratic politics fall short of institutionalizing impartiality and equality.<sup>23</sup> To sum up, we have good reason to adopt deliberative procedures, but also good reason to accept a role for the hypothetical reasoning underpinning contractualism.

After denying that the outcomes of democratic decision-making constitute the common good and redefining the epistemic status of democracy, a second question needs to be answered concerning the scope of democracy. This question can be formulated as: ‘What institutions ought to be governed by democratic procedures?’. Is it only political institutions like parliament, city councils and so on, or must democracy be extended to corporations, religious associations and other associations of more voluntary character? Bringing such associations under democratic control could realize an ideal of equality and deter potential injustices carried out by corporations and other associations. If these measures are warranted they would prove to be an effective way of curbing, for example, exploitation of employees and illiberal religious practices, but are they really warranted?

There are two arguments in favour of this position, both linked to whether democracy has intrinsic or instrumental value. The first says that democratic deliberation has value in itself as a process because it is realizing an ideal of equality.

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<sup>23</sup> Paul Weithmann (1995) argues that contractualism and deliberative democracy share the same concern for realizing impartiality and equality in the political sphere. He even claims that this puts into question the distinctiveness of these two approaches to democratic theory. However, drawing such an analogy is controversial and has been subject to criticism most notably from David Estlund (2003 and 2008). I will address this issue in more detail in the next chapter, but will here point out that Cohen’s theory of deliberative democracy (which is explicitly derived from Rawls and Habermas) is easier to square with liberal constitutionalist understandings of impartiality and equality than other theories of deliberative democracy (such as Dryzek’s version which seeks to dissociate deliberative democracy from influence from the liberal tradition). Even if there are competing understandings of liberal impartiality and equality among deliberative democrats, I do not think this closes off the possibility of drawing a limited analogy between deliberative democracy and contractualism as I do in the next chapter.

The second argument says that every citizen ought to have an equal say over decisions that strongly affect his or her opportunities and wellbeing. The first argument sees democracy as intrinsically valuable. The process of democratic deliberation is an ideal in itself as it realizes the ideal of equality. The second argument sees democracy as valuable for the good effects it has on people's life; democracy is here more an instrument rather than something of value in itself. Thus, these two arguments represent democracy as, respectively, intrinsically and instrumentally valuable.

Cohen is a representative of the first view as he sees democracy as a practice valuable in itself because involvement in political debate 'shape[s] the identity and interests of citizens in ways that contribute to an attachment to the common good' (Cohen: 2002: 96). Through involvement in political debate, it is possible for the citizens not only to realize a common good or an ideal of equality, but also to shape their own and others' interests. Thus, the process of deliberation in itself is valuable, since the process itself has a profound effect on the participants. One might say in other words that deliberation is a virtue. Given that Cohen's theory rejects the idea of distinguishing between private and public, corporate democracy would be legitimate on his version of deliberative democracy.

Dahl represents the instrumental view. His position is that corporations and 'work life' exercise immense influence on citizens. He notes that 'work is central to the lives of most people. For most people, it occupies more time than any other activity' (Dahl: 1989: 327). Combine this with how work influences self-respect, health, income, leisure, family life and a range of other aspects of life, and it is clear that work strongly affects citizens' opportunities. Democratic procedures would provide workers with an equal say in the organization of their workplace. Thus, corporate democracy would be justified because of its good effects.

Interestingly this shows that both pluralism and deliberative democracy accept workplace democracy, but what is liberal democracy's position? In general, employees are adults of sound mind who join organizations and associations voluntarily. They also have the chance to withdraw if they wish to do so. Given these two premises, one can ask why, for example, citizens should not be able to work at non-democratic run workplaces if they wish to do so? In a free society, citizens ought to be free to do so. This means that liberal constitutionalism does not demand that workplaces ought to be governed democratically. There are strong reasons in favour of private discretion and individual liberty to let workers and employers sort out by

themselves how a corporation ought to be organized. Workers are not forced to work for a specific employer and have the right to leave if they wish.

However, undeniably working life contains many examples of coercion, exploitation and unequal power relations between workers and capitalists. How can liberal constitutionalism address these issues? The answer is that these issues can best be addressed by legislation that makes such practices illegal combined with an institution that oversees the implementation of employment legislation. It would be an absurd consequence if democracy required that all workplaces had to organize their business around democratic ideals. Similarly, liberal constitutionalism rejects the view that religious and other voluntary organizations have to organize their associations around democratic procedures. This presupposes that the two provisos mentioned above must be in place, and that the general legislation reflects workers' concern adequately.

To summarise the points discussed in this section: it is clear that from the perspective of liberal constitutionalism that democracy only has weak epistemic status. The status of the outcomes of democratic decision-making express what the majority think of as the right decision. Wide deliberation improves the quality of the democratic *process* by ensuring that all significant views and opinions are represented and voiced in the process leading up to the decision, but it does not necessarily improve the quality of the *outcomes*. In addition, we have seen that liberal constitutionalism thinks of the scope of democracy as confined to the sphere of politics. Workplace democracy as understood by Cohen and Dahl is not demanded by liberal constitutionalism (workplace democracy is compatible with liberal constitutionalism, but cannot be said to be a requirement of it as this would limit the right to freedom of association). The democratic organization of voluntary organizations, such as religious associations, is also rejected as a requirement of liberal constitutionalism. This means that the liberal constitutionalist understanding of the scope and status of democracy differs from the way in which these are understood by both pluralism and deliberative democracy; thus neither of the latter two theories proves entirely satisfying for a liberal constitutionalist.

## **5. Concluding Remarks**

The discussion in this chapter leads to two important conclusions. Firstly, that the process of egalitarian democratic decision-making is the strongest conception of a

common good at which it is possible to arrive in diverse and plural societies. Secondly, the necessary scope of democracy extends only to politics, but can be extended further to include workplaces and other associations if the members choose to do so; these institutions may be or may not be democratically organized. In addition, we have seen that liberal constitutionalism is built around the ideals of equality, impartiality and liberty. These ideals serve as the foundation for constructing a liberal constitutional political order. The analysis in this chapter has taken us somewhat closer to an answer to the second challenge outlined in the Introduction regarding what type of democracy liberal constitutionalism requires. Liberal constitutionalism rejects both pluralism and deliberative democracy in their pure forms, but borrows elements from both of them. From pluralism, liberal constitutionalism borrows the idea that the strongest conception of a common good in democracy is to think of the democratic system itself as the common good. From deliberative democracy, liberal constitutionalism borrows the emphasis on wide deliberations to ensure that all views and perspectives on an issue are adequately represented in the process. These features will be incorporated further in a distinct liberal constitutionalist political order in Chapter seven, but before pursuing that task I will discuss in the next chapter what justice requires in terms of fundamental rights and how these rights can be squared with the understanding of democracy deployed in this chapter.



## CHAPTER SIX

### The Rights Question

[A] *people that can do what it wants to is not wise.*

Niccolo Machiavelli<sup>24</sup>

Famously, a majority can make unjust or oppressive decisions. A central liberal constitutional concern is to build in constraints that rule out decisions which harm or oppress vulnerable minorities. The most important liberal strategy to protect minorities is a set of equal civil and political rights. These rights are outside the reach of ordinary politics and in a sense mean that a people cannot do everything it might want. The set of constitutional rights constrains the majority in what they can do or not do. Liberal constitutional theorists believe that this is a wise device to avoid harmful and oppressive practices being sanctioned by democracy. However, this view is controversial among many democratic theorists: we saw in the previous chapter how Robert A. Dahl opposed this move, and we have in earlier chapters seen that Jeremy Waldron and others share the same worry about the undemocratic character of constraining democracy in this way. If the critics of constraining democracy through a set of civil rights are right in their criticism then the hope for a liberal constitutional order evaporates and seems untenable. It is therefore an important question for liberal constitutionalists to what extent civil rights can be squared with democracy. In the present chapter, the aim is to assess whether it is possible to mount a liberal constitutional defence of constraining democracy with a set of fundamental civil and political rights.

I begin with a discussion of what is at stake here, what the objectors oppose and what the defenders of substantive rights seek to defend. The aim is to arrive at a clear understanding of the issue that divides the protagonists. After presenting the different views in this discussion, I will in sections two and three discuss two arguments in favour of substantive rights in the constitution. The first argues that the procedural rights associated with democracy and the substantive rights associated with liberalism are in fact justified for the same reasons. That is, the reasons that justify procedural

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<sup>24</sup> Machiavelli: *The Chief works and Others*, vol. 1, p. 317.

rights are broadly the same as the reasons that justify substantive rights. This means that they are derived from the same origin and cannot be so easily separated as some of the critics of substantive rights argue. This is supported by the view that although the procedural rights associated with democracy set the process of public decision-making, they are nevertheless substantive moral principles. Thus, they cannot be separated from the substantive rights defended by many liberals.

The second argument takes issue with the demandingness and impracticality of deliberative democracy. It states that if it were practically possible to create ideal speech situations and to implement the procedures sought by deliberative democrats, the electorate would not violate the basic interests of individuals because the actual political process would be impartial and would focus on the better argument rather than narrow self-interest. However, I argue that it is unrealistic to believe that ideal speech situations and the ideal of deliberation put forward by many deliberative democrats can actually be realized in real democracies. Because the ideals of deliberative democracy are difficult to realize, there is a need for hypothetical reasoning and for an additional set of liberal civil rights that seek to offer adequate protection to citizens' basic interests.

In addition, I argue that deliberative democrats ought to be less sceptical of this move than they often are, because there is an important analogy between deliberative democracy and contractualism. Both seek to defend a political order where biases are denied influence in the political process. That does not mean that impartiality and equality play the same role in deliberative democracy and contractualism, but it means they share some of the same concerns and can benefit from each other perspectives. Deliberative democrats who are persuaded by the virtue of actual deliberations ought to be less sceptical of the hypothetical reasoning used in contractualism because contractualism seeks to constitute hypothetical ideal speech situations that express the equality and impartiality many deliberative democrats seek to realize through their emphasis on ideal speech situations and deliberative practices.

This idea of an analogy between deliberative democracy and contractualism is controversial and has been subjected to robust criticism. In the final section of this chapter I will try to show that this criticism fails and that it is possible to think in terms of an analogy between deliberative democracy and contractualism. So, in the end, my conclusion is that it is possible to defend the idea that substantive rights can be squared with democracy without undermining popular sovereignty and political

equality.

### **1. What is Wrong with Substantive Rights?**

Briefly stated, the problem is that constitutionally embedding a set of fundamental rights is claimed to be undemocratic for one (or both) of two reasons. (1) It undermines popular sovereignty and political equality. (2) Given that modern politics is defined by diversity and disagreement, there is no basis for agreement on which rights are fundamental, and so any given set of rights will not be justifiable to all. Before discussing how liberal constitutionalists respond to (1) and (2), I will explain them in more detail.

Starting with (1): Dahl worries that fundamental rights constitute a form of guardianship similar to Plato's rule of the wise. Against the worry that the people need protection against themselves in the form of fundamental rights Dahl believes that: 'an adequate level of moral competence is widely distributed among human beings, and in any case no distinctively superior moral elite can be identified or safely entrusted with the power to rule over the rest' (Dahl: 1989: 59). In fact, 'the insistence that substantive results take precedence over processes becomes a flatly antidemocratic justification for guardianship and "substantive democracy" becomes a deceptive label for what is in fact a dictatorship' (Dahl: 1989: 163). However, in the end, the conflict between process and substance is, Dahl thinks, not really a conflict between substantive justice and democracy. 'On the contrary, it reflects a failure of the democratic process. That conclusion is not merely of theoretical significance. It's of practical importance for it informs us that the solution may not be to impose limits on the democratic process... The solution may be instead to improve the operation of the democratic process: to make it more truly democratic' (Dahl: 1989: 174).

What Dahl objects to is primarily that constitutionalizing fundamental rights breaks with both the principle of popular sovereignty and the principle of political equality. The principle of popular sovereignty states that the people are the highest political and moral authority in a democracy. Popular sovereignty is not only an important element in contemporary democratic theory, but has been acknowledged as crucial by liberals at least since Locke (1689) and Rousseau (1762). Thus, we see the tension between process and substance is not only a tension between democrats and liberals, but is a tension that runs within liberal theory as well. Invoking substantive rights effectively means that these rights trump the authority of the people and this

violates the principle of popular sovereignty. Similarly, the principle of equal political rights is violated through the usual liberal adoption of judicial review (or other extra-democratic measures to oversee the constitution), because this effectively means that political power is vested in the hands of unelected judges, and hence these judges have more political power than other citizens. In the end, Dahl acknowledges that the democratic process can be tainted by the rule of the majority, but he says that acknowledging this fact should not lead us to embed substantive rights in the constitution. Instead, as we have seen, he argues that the democratic process itself must be improved to remedy the problem of potential violations of weak minorities.

A version of (2) is put forward by Jeremy Waldron whose argument revolves around the impossibility of agreement on the content of a set of fundamental rights to be included in a modern democracy. Recall from earlier chapters Waldron's claim about how deep disagreement runs in modern societies marked by diversity and pluralism, and the question Waldron asks based on acknowledging this is, given disagreement, how should political decisions be made? As it is, 'we are left in a legitimacy-free zone in which the best we can hope for is that a legitimate democratic system emerges somehow or another' (Waldron: 1999: 300). This means that in the political order prescribed by Waldron everything is up for grabs, 'including the rights associated with democracy itself' (Waldron: 1999: 303). However, Waldron can safely re-assure us that this does not mean that politics is completely self-interested or 'civil war carried out by other means' (MacIntyre: 1981: 253). He tells us that:

The proper alternative to the self-interested model is a model of opinionated disagreement - a noisy scenario in which men and women of high spirit argue passionately and vociferously about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what's in it for them but by a desire to get it right.

(Waldron: 1999: 305)

A difference between Dahl and Waldron is that Dahl is strongly committed to upholding an ideal of moral and political equality, and equal political rights constitute a cornerstone in his thinking about democracy. Thus, for Dahl, procedural rights securing equal political rights are of great importance. By contrast, Waldron not only rejects substantive rights, but also argues that procedural rights must be rejected. All

we have left and must rely on is that citizens will approach politics reasonably and impartially, which is perhaps not particularly reassuring for marginalized ethnic and religious minorities. For all its boldness, there is one thing to be said in defence of Waldron and that is that his description is certainly realistic concerning the level of disagreement in most societies, and that modern democracies rest on a weak foundation in that they require the active support of the people to be sustained.

We now see the main contours of the criticism of substantive rights as being in tension with democracy. These two views ought to be contrasted with what the defenders of substantive rights argue in favour of their position. I will here discuss three justifications of substantive rights. The first two views argue from the perspective of contractualism, while the third view is non-contractual. Taken together these three perspectives offer different arguments as to why substantive rights may be justifiable.

Social contract based defences of substantive rights start from the democratic assumption of the people as fully sovereign understood as equals. From a contractual perspective these assumptions will give rise to equal political rights, and a democratic order. 'But in order for these considerations to be convincing to free and equal rational persons, certain background conditions must be sustained. At the level of constitutional choice, their representatives will want to insure that the ordinary procedures for making laws do not compromise anyone's sovereignty by endangering the rights and liberties necessary for free persons' pursuit of their good' (Freeman: 1990: 352). One way to protect these rights is through judicial review as discussed in Chapter four, and in this situation 'free and equal sovereign persons might rationally agree to... a constraint upon majority legislative processes, to protect the equal basic rights that constitute democratic sovereignty' (Freeman: 1990: 353). From a social contract view, substantive rights form part of a democratic order, and are important in maintaining the democratic character of the political system.

A second argument and an important idea implicit in constitutional liberalism is the idea that democracy is more than strict majority-rule. This idea is succinctly expressed in the following way: 'nobody but a moral imbecile would really be prepared to deliver himself over body and soul to the majority principle' (Barry: 1989: 38). Although, this formulation is quite strong, I take it that what is meant here is that an adequate conception of democracy cannot be merely majority-rule. Barry's point is that it is not at all obvious that in a political order based on popular sovereignty majority-

rule is the only legitimate institution.

A third, non-contractual, alternative is available that might rest on less controversial assumptions than the social contract ideas above. This argument starts with questioning whether it is fairer to resolve disagreements over political principles through democracy or through extra-democratic institutions such as judicial review. Ronald Dworkin argues that leaving all decisions to majority-rule has a flavour of making ‘the majority judge in its own case,’ and this ‘seems inconsistent and unjust’ (Dworkin: 1977: 142). This makes him conclude that: ‘principles of fairness seem to speak against, not for, the argument from democracy’ (Dworkin: 1977: 142). Although, he acknowledges that leaving decisions over basic rights to extra-democratic institutions is far from a guarantee against rights violations, it is at least an insurance against the majority’s potential abuses of their power (Dworkin: 1977: 143-144). Dworkin worries that whilst ‘of course the comfort of the majority will require some accommodation for minorities’, this will only be ‘to the extent necessary to preserve order; and that is usually an accommodation that falls short of recognizing their rights’ (Dworkin: 1977: 146). What Dworkin draws attention to here is that bare majority-rule may end in a *modus vivendi* situation where the majority only accommodates the minority as much as is required to ensure order. In other words, the majority may use their superior bargaining power to constrain the minority to accept outcomes leaving them perhaps better off than with no outcome at all, but far from securing for them the same gains from social cooperation as are enjoyed by the majority. Majority-rule thus embodies an element of mutual advantage.

From this discussion of the adversaries in the debate over substantive rights we now have a clearer idea of what the critics attack and what the proponents defend. There are two main claims made against embedded substantive rights. These are: (1) they denigrate democratic equality understood as political equality, and (2) given widespread disagreement over the existence and significance of different rights it is impossible to defend a certain set of rights as fundamental in a way that is justifiable to all reasonable citizens. Although, Dworkin’s counter-argument against (1) is not a knock-down argument, it does undermine the claim that democracy as majority-rule is the only just and fair conception of democracy. In the next section I will present an additional argument concerning the co-originality of procedural and substantive rights to further undermine (1).

With respect to (2), I think this is a stronger argument against substantive rights.

Importantly, it puts into question not only the idea of substantive rights, but also contractualism more generally, because it seems to reject the possibility of deriving, for example, a set of fundamental rights from contractualism. The argument presented by Waldron contains an element of moral scepticism in that it questions the possibility of attaining any sort of moral convergence or agreement. My purpose in this thesis is not to argue against moral scepticism and I will not aim to offer an argument against this sceptical position. Instead, I will offer in section three a more modest argument that might be convincing at least to deliberative democrats who defend an impartial and untainted political process. More specifically, I will argue that there is an important analogy between contractual reasoning and deliberative democracy in that both perspectives share some of the same ideals, but they differ in how to realize these ideals. If deliberative democrats are persuaded by the analogy I draw between these two perspectives, they will simultaneously have good reason to be less sceptical about the element of hypothetical reasoning expressed in contractualism.

## **2. The Co-originality of Procedural and Substantive Rights**

I want to draw attention to two things in this section. First, to the fact that even the procedural and relatively limited account of democracy offered by Dahl requires wide acceptance of a number of moral assumptions. The significance of these assumptions is that Dahl requires them to be embedded in the political culture of society. By contrast, liberal constitutionalists demand that substantive rights ought to be protected by the constitution and not merely be dependent on a democratic culture. The second claim I want to make is that in the end both procedural and substantive rights are derived from the same theoretical sources. Therefore, it is difficult to rely on a strict separation between them, and misleading to label them procedural and substantive as if they were completely different kinds of rights.

Dahl accepts that ‘even a just process might sometimes produce an unjust outcome’ (Dahl: 1989: 163). Despite acknowledging this, he maintains (as we saw above) that with embedded rights ‘substantive democracy becomes a deceptive label for what is in fact dictatorship’. This is a strong claim, but what underlies this fierce rejection of substantive democracy is the idea that for democracy to be possible at all there must be a democratic culture. Or, as Dahl puts it, ‘the democratic process isn’t likely to be preserved for very long unless the people of a country preponderantly believe that it’s desirable and unless their belief comes to be embedded in their habits,

practices, and culture' (Dahl: 1989: 172). Instead of relying on constitutional barriers and reviews of legislation, Dahl instead requires that the citizens actively endorse the idea of democracy and that the ideals of democracy are deeply rooted in society's culture. If this condition is fulfilled, then democracy will be stable and it will not seriously harm the interests of a minority, or violate any group of individuals' fundamental interests. Dahl's theory of democracy therefore emphasizes a process of procedures for public decision-making where the people is sovereign, and any extra-democratic institutions are neither legitimate nor necessary because the theory presupposes that the electorate is reasonable.

This kind of proceduralism is therefore not as limited or minimal as it might seem. It requires that the people endorse many substantive moral principles, such as equal political rights, taking other people's interests in to account, and approaching political questions fairly. All these are substantive moral requirements, so it is wrong to think of proceduralism as not embodying thick moral standards. The crucial difference between liberal constitutional democracy and proceduralism is that constitutional democracy requires a set of formal constraints on democracy, while proceduralism requires that these be embedded in the culture of society instead. The difference between constitutional democracy and proceduralism is therefore a difference of degree rather than of kind, as both positions require some of the same constraints, but disagree over how these are to be integrated into the overall account of democracy.

It would still be legitimate for proceduralists to claim that constitutional democracy represents guardianship since a constitution with a set of fundamental rights is top-down, in contrast to when the same constraints are invoked bottom-up through a democratic culture. In the latter case the people are the source of the constraints and voluntarily limit themselves. That is a legitimate move as it corresponds with the ideal of political equality and the equal intrinsic moral worth of each person. In contrast, critics of liberal constitutionalism (like Dahl) claim that liberal constitutionalism represents a breach with political equality, because constraints can be invoked without the consent of the people. This is equivalent to disrespect for the democratic ideal itself. So, in a sense both constitutional democracy and procedural democracy presuppose some of the same constraints, but disagree over what constitutes a legitimate implementation of these necessary conditions for a working democratic order. Liberal constitutionalists hold that invoking constraints



top-down through contractualism can be legitimate, while democrats like Dahl hold that constraints are only legitimate when invoked bottom-up.

The critics suppose that procedural and substantive rights are entirely different types of rights. However, I want to challenge this view and argue that both procedural and substantive rights share some of the same concerns. Hence, the implementation of the constraints of democracy become less of a battleground as the opposition between procedural and substantive rights is not as stark as the critics assume.

The reason it is not obvious that there is such a strict distinction between the substantive and procedural elements of democracy is because the ‘fundamental justifications for having democratic procedures lie essentially in the same realm as arguments for social justice’ (Dowding: 2004: 25). More specifically:

Democracy is procedural, but then so is justice. Systems of justice may be set up for specific distributional or social reasons, but those systems are constituted of procedures for ensuring that the distributional and social consequences result. Similarly, democracy is a procedure, but if that procedure leads to injustices then we cannot expect reasonable people to accept those procedures indefinitely... What I have in mind is the simple contractual analogy. We enter into a contract to form a set of rules to govern our democracy. Some of the rules are set up to ensure we have entered a society that is just. We assume that those signing the contract did so willingly, and there was no domination of one group by another.

(Dowding: 2004: 32-33)

The crux of Dowding’s argument is that in the end what is appealing about democracy is that it is just and fair. Following on from that, one can argue that there is no strict distinction between the rights necessary for upholding the democratic process and the additional rights advocated by constitutional democrats.

This line of thinking is explored further by thinking that procedural rights and substantive rights (freedom of religion, integrity of the person and so on) are co-original.<sup>25</sup> Co-original can here mean either that procedural and substantive rights historically developed from the same concerns and in this way are hard to distinguish or that they are philosophically derived from the same sources. In this thesis I am mainly concerned with the latter understanding (although these two understandings are obviously connected). In Rawls, for example, the co-originality of procedural and

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<sup>25</sup> See Jürgen Habermas (1998), *On the Internal Relation between Law and Democracy, The Inclusion of the Other*, Cambridge, MA: MIT Press, p. 259.

substantive rights is manifest through ‘the Rawlsian ideal of the person’ (Gutmann: 174: 2003). Both procedural and substantive rights are necessary to offer conditions under which a person’s interests are sufficiently protected. However, the co-originality ‘does not answer the question of how the value of political freedom compares with that of personal freedom when they come into conflict’ (Gutmann: 2003: 174). Political freedom and personal freedom here roughly correspond to procedural and substantive rights respectively. That the co-originality thesis does not explain how procedural and substantive rights ought to be reconciled if they conflict might seem like a weakness of liberal constitutional democracy, but I think instead it points out how difficult it is to separate completely the procedural and substantive aspects of democracy.

Acknowledging the co-originality thesis leads to endorsement of some kind of deliberative democracy because although disagreements are accepted, thinking of procedural and substantive rights as co-original opens up a ‘view of democratic politics as an arena of argument rather than a competition for power, fair aggregation of interests, or of expression of shared cultural commitments’ (Cohen: 2003: 102). The critical point here is that democracy is seen as a deliberation over how to find the best resolutions to questions of public affairs.

Effectively, this reply plays down the conflict between democracy and justice, which the critics of liberal constitutionalism emphasize. This observation is supported by the discussions in earlier chapters of the role of reason and the conflict between diversity and autonomy. The critics emphasize how diversity makes it difficult to reach solutions endorsed by everyone. The defenders of constitutional democracy and fundamental rights stress that the character of procedural and substantive rights are not so different in the end. So, if procedural rights are acceptable (or even required), then why not also accept substantive rights as these are derived from the same foundation? The critics also stress that convergence of reason is an illusion and in a world marked by nothing but diversity, and thus that politics must be based on a weak understanding of what is reasonable. Anything other than a weak understanding would undermine the authority of the people and fail to acknowledge the importance of people’s notions of identity and self-respect. In contrast, constitutional democracy focused on deliberation stresses that democracy is not merely a competition or mechanism for aggregating preferences, but concerns something far more serious, namely, how public affairs can be arranged given disagreement.

Although aligning liberalism with deliberative democracy is tempting, aligning constitutional democracy too close to deliberative democracy contains some highly problematic elements for liberals. We have seen in the previous chapter that deliberative democracy relies on a controversial notion of the common good and threatens the distinction between first-order and second-order impartiality. Therefore, the endorsement of deliberative democracy is a qualified one. Among other things, this underlines the importance of the position defended in the previous chapter of adopting deliberative practices and perspectives into constitutional democracy, but at the same time endorsing the less controversial notion of the common good as expressed in the procedures of democratic decision-making themselves.

The significance of the first argument is to point out that the theory of democracy advanced by Dahl – a stout critic of substantive democracy – rests on the premise that a democratic culture must be deeply embedded in the electorate. The people must strongly believe in the desirability of a democratic system. Furthermore, if this belief in the desirability of democracy is deeply embedded, as Dahl requires, then it works as a safeguard against possible violations of the interests of weak and marginalized minorities. The problem is simply that if such beliefs are the only protection of marginalized minorities then this is insufficient as the weak and marginalized have few means to back up their claims.

Furthermore, if these beliefs are supposed to be strong enough to guard against a majority abusing its superior bargaining power, then this requires an electorate of saints, not fallible and sometimes self-interested human beings. The point is not that human nature is always or mainly self-interested, but that under certain circumstances self-interest may be dominant. Therefore, to safeguard against fallibility and occasions of self-interest, protection of basic rights through embedded substantive rights is important. This does not mean that judicial review or any other institution responsible for reviewing legislation is able to detect and avoid all abuses of power (indeed, for many years, the Supreme Court of the USA upheld systematic racial discrimination). Rather, the point is that judicial review serves as a safeguard. There is ‘no procedural alchemy whereby a majority bent on injustice can be made to pursue justice instead’ (Barry: 1995: 101), but that is not a reason not to implement the best procedures possible.

The second argument deployed in this section highlights that the concern for procedural fairness embedded in democratic theory has the same origin as the concern

for substantive rights (such as freedom of religion, the integrity of the person, and so on). Both equal political rights and substantive civil rights are based on the same premise of the equal intrinsic worth of each person. Therefore, democratic theorists should not discard substantive rights as easily as they do. At least not strong proceduralists such as Dahl, as his account of democracy presupposes that the ideals of democracy are deeply embedded in the society's culture. Waldron, though, poses a different challenge given that he does not acknowledge the importance of procedural rights. For him, as we have seen, everything is up for grabs, even the democratic procedures themselves. Given his rejection of the somewhat weaker and less controversial idea of procedural rights, Waldron is bound also to reject substantive rights.

To sum up, this section has identified some important connections between democracy and justice that will be valuable for the argument in the next section, which is about the analogy between deliberative democracy and contractualism. First, the difference between proceduralists and substantive democrats is not as deep as first assumed by the critics. Second, liberal constitutionalists support deliberative democrats in believing in the importance of incorporating deliberative practices into the democratic decision-making process. Both these points underline the claim that there are important links between democratic theory and liberalism, and that there is an analogy between the underlying thinking expressed in contractualism and in theories of deliberative democracy.

### **3. The Analogy between Contractualism and Democracy**

The argument that there is an analogy between contractualism and deliberative democracy has three main steps. First, I hold that contractualism shares many of the same ideas and is informed by the same underlying thinking as deliberative democracy. Second, that evidence for the analogy can be found in the discussion between Rawls and Habermas. Third, and finally, this leads us to see that the theoretical positions of contractualism and deliberative democracy are much closer to each other than is commonly assumed, which means that we can conclude that they mutually inform each other and contribute toward realizing the same ends. This conclusion does not necessarily mean that deliberative democracy and contractualism can be fully reconciled, but I will argue that it means that contractualism contributes to democratic thought.

What is appealing about the version of deliberative democracy advocated by, for example, Cohen is that it tries to secure procedures and methods for making political decisions that are abstracted from biases such as partiality and socio-economic inequalities. The theory describes procedures for how equal political rights can be upheld under actual political deliberations. Searching for such procedures is an important part of realizing the ideals of equality and impartiality. The appeal of contractualism lies in the same terrain. It is a useful device to check institutions as it too attempts to avoid biases such as partiality and inequality tainting the political process. Furthermore, contractualism says something about how to distribute goods by upholding certain principles and rights. The conditions envisioned in the original position are conditions of equality and conditions in which the parties are equally motivated to reach non-rejectable agreements. Both deliberative democracy and contractualism think that an ideal political order would be one where partiality and inequality does not affect the outcome of the political process. Thus, both deliberative democracy and contractualism to some extent seek a political order based on impartiality and equality. Therefore, some of the same aspects that we find appealing about deliberative democracy are the same aspects we find appealing about contractualism.

Indeed, contractualism and deliberative democracy share not only the same ideals – impartiality and equality – but they also share some of the same underlying thinking. Both are engaged in realizing a political order that is justifiable to all reasonable people. Deliberative democracy's emphasis on consensus gives a person objecting to a proposal a veto-power (at least in theory) so long as their objection is reasonable. Similarly, the contractual emphasis on reasonable rejectability allows those affected by a given proposal the power to offer reasons as to why it should be defeated. In short, contractualism and deliberative democracy rely on some of the same underlying thinking. This is not to say, of course, that they are essentially the same, only that they both share some important aspects. Yet, this is an important point as it means that contractualism can be relevant to the way we think about democracy.

Despite the shared ideals and underlying thinking, there are important differences between these two perspectives that it is necessary to bear in mind as well. First, there is the matter of whether or not it is possible to realize ideal deliberations in actual democracies. Deliberative democrats argue in favour of the possibility of actually realizing a political order based on ideal deliberation. Typically, deliberative

democrats argue that a political process based on equal representation, equal opportunity to participate, and where none of the participants have any advantages relative to others, will yield outcomes that are justifiable to everyone.

Contractualists agree that a political process of that kind would yield just outcomes, but they reject the premise that realizing such a process is actually possible, at least to the degree necessary to protect the basic interests of each person adequately. Contractualists claim that the requirements imposed by deliberative democracy are too demanding in the real world. In actual political deliberations citizens sometimes act according to their self-interest. This does not mean that they are *unable* to be impartial and reasonable, but they are not always impartial and reasonable. This is a more pessimistic (and realistic) view of the possibilities of actual democratic institutions than that of deliberative democrats.

Given the difficulties of actual deliberations, contractualists argue in favour of safeguarding the interests of the individual through a set of constitutional rights. This move gives rise to a second difference between the two positions. Since a Habermasian ideal speech situation is difficult to realize and actual democratic deliberations are fallible and sometimes self-interested, contractualists ask the hypothetical question: ‘what would reasonable and impartial citizens agree to under ideal circumstances?’ The answer to this question is that a political order that is justifiable to everyone is one based on equal representation, equal opportunities to influence the political process, and where citizens have ‘a sense of justice’ (Rawls: 1999a). With these conditions in place, the outcomes will be acceptable to everyone, and the political order will be properly just. Nevertheless, given the imperfections of democratic decision-making, even just procedures may produce unjust outcomes. Therefore, in contractualism a need to protect against these shortcomings arises. From these assumptions contractualists argue that impartial and reasonable persons will choose a set of rights that protect the integrity of the person, freedom of religion and so on.

The main differences between contractualism and deliberative democracy are therefore derived from a different conception of the possibilities of democratic decision-making. Contractualists have a more pessimistic view of politics, while deliberative democrats have a more optimistic view of the possibilities of actual deliberations.

From a brief review of the exchanges between Habermas and Rawls I believe both

the similarities and differences between contractualism and deliberative democracy can be appreciated. Rawls is a good example here as contractualism as he understands it defends a set of fundamental rights. Likewise, Habermas is a good example of an adherent of deliberative democracy. As we have seen in earlier chapters, he argues in favour of the importance of actual deliberations. Comparing these two theorists helps us to identify both the similar intentions and how the same underlying thinking influences both perspectives.

First, Habermas in his remarks on Rawls' *Political Liberalism* asserts that he 'shares its [*Political Liberalism*'s] intentions' and that his disagreement with Rawls' project is 'within the bounds of a familial dispute' (Habermas: 1995: 105). Clearly, Habermas also acknowledges the similarities that exist between the two perspectives. Recall from the discussion of both Rawls and Habermas in Chapter two that both theorists put a great deal of emphasis on the importance of consensus. The role of consensus is that if a principle or a political order is supported by a consensus, then that means that it meets the conditions for legitimacy. Furthermore, both theories emphasize the importance of avoiding a situation in which relative bargaining power and brute force can affect the political process.

At this point one of the major differences between the two positions becomes apparent. Rawls allows for hypothetical reasoning to bind the citizens, while Habermas holds that every issue ought to be discussed through actual deliberations. This difference is significant for the present discussion, as it points out how they differ when it comes to the way in which they constrain the political process to ensure legitimate outcomes. Rawls believes that the set of fundamental rights has priority over the outcome of democratic decision-making and ought to be outside the scope of ordinary politics. This is necessary to avoid the possibility that the political process itself will lead to intolerable injustices. So, in this respect democracy is inferior to liberal rights on Rawls' view. In contrast, Habermas instead aims to create an ideal speech situation, along the lines described in Chapter two, where none of the parties is coerced and where the participants have equal opportunities to express themselves and influence the outcome. In so far as the process actually matches this description the outcomes will be justifiable and legitimate.

Briefly summarized, Rawls and Habermas agree on the ideal of a legitimate political order. It should emphasize equality and impartiality, and ensure that the political decision-making process is not tainted by biases. However, they disagree

about how these ideals can be achieved. Although both acknowledge that the political process must be constrained, they have different answers as to how this ought to be done. Rawls argues in favour of constraints through contractualism and hypothetical reasoning, and Habermas through constraints on the process of actual democratic decision-making.

This discussion has several important implications for the scope of both contractualism and democracy. I believe that to the extent that the actual democratic process is impartial and realizes the ideal of moral and political equality there is no need to resort to the hypothetical reasoning found in contractualism. However, the process will not always be perfect, and to ensure the basic interests of the citizens it is necessary to embed a set of fundamental rights the content of which is derived from contractualism. Contractual thinking only informs the democratic process on these issues; on all other issues there is no need to resort to the contract (to hypothetical reasoning). This shows that the scope of contractualism is specific and limited. Because of its limited scope, it cannot be said that contractualism undermines the importance of political deliberations in any significant way. This view is supported by the fact that deliberative democrats and contractualists share some of the same underlying thinking and ideals. Thus, the hypothetical reasoning in contractualism should sound familiar to deliberative democrats concerned with the importance of equality and impartiality.

But now, why should deliberative democrats be attracted by the contractual account? I think there are two reasons. First, the contractualist view of the actual conditions informing democratic decision-making in real democracies is more realistic than the view of democratic institutions in deliberative democracy. Contractualism includes measures against the fallibility of democratic institutions and the electorate's sometimes self-interested behaviour in the form of protection of citizens' basic interests and this should be appealing to deliberative democrats as well. The second reason why deliberative democrats ought to find contractualism attractive appeals to the shared commitments to avoiding biases and to the importance of equality and impartiality in democracy. These important similarities between contractualism and deliberative democracy should make deliberative democrats open to the idea that contractualism can contribute to our thinking about democracy.

Even if there is an analogy between contractualism and deliberative democracy, this, of course, does not mean that they are identical. Instead, it means that the



differences between these two perspectives are smaller than is commonly assumed. Contractualism tells us to ensure that actual deliberations are carried out without causing harm to weak and marginalized minorities. This is a concern shared by deliberative democrats. Deliberative democracy also informs contractualist thinking, by pointing out that when the conditions are impartial enough, then there is no need to resort to contractual thinking. So, in this respect deliberative democracy is important in defining the scope of contractualism. On this view, deliberative democracy and contractualism mutually supplement each other and work in tandem in the design and maintenance of a legitimate political order.

The discussion of the analogy between deliberative democracy and contractualism contributes to the discussion between substantive and procedural democracy. If the argument for the analogy between these two perspectives is sound, it supports the case for thinking that substantive democracy and procedural democracy are closer to each other than their respective adherents would have us believe. However, it has been argued that the analogy between contractualism and deliberative democracy fails, and if that were true then this would similarly undermine the argument for the closeness of substantive and procedural accounts of democracy. Thus, it is important to consider the counterargument, which is the task of the next section.

#### **4. Defending the Analogy**

The objection I discuss in this section seeks to reject the view that there is ‘a *democracy/contractualism analogy*, in which justice is understood along contractualist lines (explained below), and then outcomes of proper democratic arrangements are held to track justice (call this the *Tracking Claim*), and to do so because they have a structural similarity to the hypothetical choice situation posited in contractualism’ (Estlund: 2003: 387, original emphasis).<sup>26</sup> The crux of the objection is that actual democratic practices are unable to realize contractual justice, and because of this it makes no sense to claim that they are analogous. In short, the structural similarities and shared underlying thinking together do not amount to an analogy between contractualism and deliberative democracy. Thus, deliberative democracy does not serve as an approximation of contractualism. If correct, this is a fatal objection to the analogy presented in the previous section. However, the analogy I defend can be

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<sup>26</sup> See Estlund (2008) for another and more detailed (although quite similar) discussion of this objection.

maintained independent of the tracking claim and is significantly different from the type of analogy which is the object of Estlund's criticism. Therefore, I believe that even if deliberative democracy does not track justice it is still possible to maintain that there is an analogy between deliberative democracy and contractualism that can illuminate the way we think about democracy.

Before elaborating on this claim I will explain briefly what the analogy between deliberative democracy and contractualism is often taken to be. The analogy can be briefly summarized thus: 'proper democracy produces justice because it structurally resembles the hypothetical choice situation that is central to contractualism's account of justice or right' (Estlund: 2003: 388). The analogy starts from the idea that the procedures of contractualism and deliberative democracy share certain similarities. We saw above that both deliberative democracy and contractualism agree on the importance of avoiding a situation in which the political process is tainted by biases such as partiality and unequal relative bargaining power. The analogy draws on this similarity and it can be formulated in this more formal way: 'an actual choice procedure will tend to track justice if it is sufficiently like the hypothetical choice procedure contractualism employs to explicate the content of justice' (Estlund: 2003: 390). Given the procedural similarity, the claim is that 'a tendency of actual democratic procedures to produce outcomes that are right by contractualist standards can realistically be pursued by promoting the similarity (in certain respects) of actual procedures to the procedure in the hypothetical contractualist situation' (Estlund: 2003: 390). This is the position that Estlund seeks to criticise and in doing so he takes on those liberal constitutionalist theorists who hold that there is this sort of relationship between actual and hypothetical choice situations.<sup>27</sup>

For example, John Rawls holds that 'political justice has two aspects... First, the constitution is to be a just procedure satisfying the requirements of equal liberty; and

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<sup>27</sup> It might seem paradoxical that the previous section emphasized the similarities between contractualism and deliberative democracy and that the present section seems to suggest that contractualism and deliberative democracy are not as close as is sometimes assumed. However, the claim in the previous section was aimed at those democratic theorists (like Dahl and Waldron) who refuse to acknowledge that contractualism can play a role in democratic thinking, while the present argument is directed towards those who perhaps over-interpret the similarities between contractualism and deliberative democracy. Thus, the arguments of the previous and present sections are directed towards different opponents. In addition, I claim there is an analogy between contractualism and deliberative democracy, but a weaker analogy than has been defended by some of the other theorists participating in this debate.

second, it is to be framed so that of all the feasible just arrangements, it is the one more likely than any other to result in a just and effective system of legislation' (Rawls: 1999a: 195). The idea expressed here is that justice requires a political society to adopt those procedures that will lead to justice, and the procedures realizing this ideal are those 'which mirror in that structure the fair representation of persons achieved by the original position' (Rawls: 1996: 330). The procedures of democracy must to some extent resemble those of the original position to realize justice. It is claims of this kind that Estlund targets under the heading of the 'Tracking Claim'.

Brian Barry deploys a similar argument. With respect to the Scanlonian contractualism on which his theory rests, he argues 'it is possible to set out procedures of a kind familiar within many liberal democratic political systems that will produce an empirical approximation of a Scanlonian original position by making it harder for rules that can reasonably be rejected to be adopted' (Barry: 1995: 104). The claim here is that the more the actual practices of democratic decision-making resemble the conditions of contractualism, the more likely it is that the actual outcomes will be substantively just and will accord with the account of justice that would emerge from the hypothetical reasoning in an original position.

It is important for the argument of this thesis to notice that Estlund is explicit in identifying the contractualism of Barry and Scanlon as his target. He emphasises this when he writes that 'by "contractualism" I will mean a Scanlonian version' (Estlund: 2003: 394). Given that Barry and Scanlon are the targets of his objection, and the subject of much of this thesis, it is therefore of the first importance to show that Estlund's objection fails to undermine the analogy I presented in the previous section.

According to Estlund, a devastating objection to the analogy between deliberative democracy and contractualism is that 'contractualism ensures that even a single reasonable rejection is fatal to a proposal, the contractors operate, in effect, under a veto rule' (Estlund: 2003: 404). This is devastating because 'actual democratic choice procedures do not, and should not, operate under a veto rule' (Estlund: 2003: 404). The essence of the objection as it is formulated here is that contractualism presupposes entirely different conditions than any deliberative democratic practice seeks to embody. Because of this discrepancy between contractualism and both the practices and ideals of deliberative democracy, the analogy between contractualism and deliberative democracy does not stand up to scrutiny.

This objection as it stands is fairly obvious, and one may ask how contractualists

can have overlooked this point, and why they have committed themselves to the structural similarity of deliberative democracy and contractualism. Estlund suggests two possible reasons: first, ‘they seem to have interpreted contractualism in a way that makes it more similar to the democratic arrangements they endorse than Scanlonian contractualism actually supports’ (Estlund: 2003: 411). Second, there has been ‘a failure to distinguish between a tendency of actual procedures to produce decisions similar to those produced by the hypothetical procedure on one hand... and a structural similarity between hypothetical and actual procedures on the other’ (Estlund: 2003: 412). Because of these two errors, contractualists have failed to see that ‘without public-interested voting and participation, it is hard to see how justice could be systematically promoted (as if by an invisible hand), since in democracy - both as it is and as it should be - victims have no veto’ (Estlund: 2003: 412). In short, contractualists have committed themselves to the deliberative democracy/contractualism analogy by a combination of over-interpreting the similarities, and failing to appreciate that just procedures may produce unjust outcomes.

Despite the force of Estlund’s argument, I believe it is possible to maintain that there is an analogy between deliberative democracy and contractualism. To substantiate this claim I will discuss the arguments presented above to see how they affect the analogy I drew in the previous section.

First, Estlund claims that contractualists have over-interpreted the similarities between deliberative democracy and contractualism by claiming that deliberative democracy (when properly designed) tracks contractual justice. This has led them wrongly to draw an analogy between deliberative democracy and contractualism. The crucial aspect of Estlund’s objection is that the analogy between contractualism and deliberative democracy is not sufficient to support the tracking claim. It is important to bear this in mind both because this is the central claim made by Estlund and because the analogy made in the previous section can be maintained without the tracking claim. Estlund’s objection and my analogy target different aspects of the relationship between contractualism and deliberative democracy. In the following, I aim to substantiate this claim and to show that it is meaningful to defend an analogy between contractualism and deliberative democracy even if deliberative democracy does not necessarily track contractual justice.

One significant difference between Estlund’s target and my analogy is that

Estlund's argument is aimed at a much stronger analogy than the one I seek to defend. Estlund attacks the view that deliberative democracy necessarily tracks contractual justice. Crucially, in actual democracies no one can veto a proposal in the same way as in contractualism and hence the analogy breaks down because veto-power is necessary to realize contractual justice. The analogy I defend is in relation to a different aspect of the link between contractualism and deliberative democracy. Liberal constitutionalism has been criticized for being undemocratic because of its insistence on including substantive rights in the constitution; rights which are thus outside the reach of ordinary politics. Now, the previous section pointed out that some of the underlying thinking in both liberal constitutionalism and deliberative democracy is similar. Deliberative democracy is not only concerned with describing the democratic process, but also with justice (avoiding that the democratic process is tainted by biases and partiality). Likewise, liberal constitutionalism is not only concerned with justice, but also has a strong commitment to the democratic process. Therefore, the kind of thinking found in liberal constitutionalism is not entirely alien to deliberative democracy. This is not to say that they are the same. Nevertheless, it is enough to show that unless one is unshakably dedicated to majoritarianism one should be open to the kind of thinking informing liberal constitutionalism and contractualism (embedding rights into the constitution).

Comparing the claim rejected by Estlund and the analogy I advance we can see that these take issue with different aspects of the relationship between contractualism and deliberative democracy. Estlund attacks the view that deliberative democracy tracks justice, while I claim only that the thinking in contractualism ought to have some appeal to deliberative democrats. Estlund attacks the view that deliberative democracy necessarily realizes contractual justice. This claim is not necessary to the analogy I advance. My analogy seeks to uphold the weaker claim that the thinking in contractualism is to some extent familiar to deliberative democrats and that they ought to be able to share with liberal constitutionalists the concern for safeguarding certain fundamental rights. It would of course make the analogy between contractualism and deliberative democracy even stronger if it were necessarily true that deliberative democracy tracked contractual justice (in such a case, of course, embedded rights would become redundant). However, what was said in the previous section does not depend on this much stronger claim. All that my argument claims is that the structural similarities between contractualism and deliberative democracy ought to make deliberative

democrats open to some of the claims made by liberal constitutionalists.

It is therefore possible to argue that even if deliberative democracy does not track justice, there is an analogy between the way contractualism and deliberative democracy work. One might say that it is precisely because deliberative democracy is not guaranteed to track justice that deliberative democrats ought to be open to protecting fundamental rights. Because democracy alone cannot protect fundamental rights there is an argument for paying attention to the liberal constitutional claim that fundamental rights ought to be embedded in the constitution.

That is to say, in drawing the weak analogy between contractualism and deliberative democracy in the way that I did in the previous section, I was clearly aware of the discrepancies between the two positions. It was importantly because deliberative democracy could not always be relied on to deliver justice analogous to a contractual original position that I argued deliberative democrats should take the hypothetical reasoning of contractualism into account. Deliberative democracy and contractualism share the same underlying thinking and the same ideals, however, actual deliberations are not always able to deliver just outcomes. Fundamental rights derivable from the original position serve as a protection against the shortcomings of actual deliberations. My point was that because deliberative democracy and contractualism share the same underlying thinking and the same ideals, accepting the importance of fundamental rights should not be too high a hurdle for deliberative democrats. Thus, it is clear that the analogy I drew in the previous section does not deny that there are discrepancies between the original position and actual democratic deliberations. Estlund's first critique, then, does not apply to my argument because the analogy on which my argument depends is weaker than the one that Estlund attributes to Rawls and Barry/Scanlon.

Aware of the possibility of this reply, Estlund argues against the possibility of even a weak analogy between the two positions on the grounds that still 'there would be a veto gap: proposals that are rejectable in the contractual situation might yet win in actual democracies' (2008: 255). This is obviously true, but this is where the set of fundamental rights plays an important role. These rights will serve as a "filter" aiming to detect proposals that are rejectable from the original position. This filter will of course not be perfect, but contractualism and liberal constitutionalism do not aim for perfection. Perhaps more important, Estlund's opposition to the deliberative democracy/contractualism analogy is premised on a strong interpretation of

contractualism. An important part of the argument of this thesis has been to argue for a weak understanding of reason and for the limited substantive implications of contractualism. In the previous section, I argued that the role contractualism played in liberal constitutionalism was merely to derive a set of fundamental rights and to set the procedures for decision making. All other issues are the ‘stuff of politics’ and can be dealt with politically, rather than through hypothetical contractual reasoning. This view is consistent with the weak interpretation of contractualism that was defended in Chapter four. The veto gap between contractualism and actual democratic decision-making, if it exists, appears only given a robust interpretation of contractualism, which this thesis has resisted. Thus, the version of contractualism defended here is substantively weaker than that posited in Estlund’s paper. Furthermore, another important part of the argument of this thesis is that liberal constitutionalism and contractualism require democracy, and a natural consequence of this position is to take the authority of democracy seriously.

This discussion has aimed to establish that the objection against the contractual/deliberative democracy analogy does not apply to the analogy outlined in the previous section. The crucial elements in rejecting this objection are to acknowledge the apparent differences between the contractual original position and the realities of actual democratic process, and to claim that a liberal constitutional order with a set of fundamental rights embodies an element of veto-power. It is also clear that the analogy in the previous section is weaker than the analogy as understood by Rawls and Barry/Scanlon (and thus Estlund). Nevertheless, it is still meaningful to maintain that there is an analogy between contractualism and deliberative democracy. One way to summarize the essence of the analogy drawn in the previous section is to say that the analogy between contractualism and deliberative democracy is not such that deliberative democracy tracks justice, but that democracy ought to take contractual insights, such as fundamental rights, into account.

Since we have seen from the discussion in this section that Estlund’s objection does not threaten the analogy made in the previous section a major obstacle for making a convincing analogy between deliberative democracy and contractualism is overcome. This should provide deliberative democrats with an additional reason to appreciate contractualism when non-ideal conditions make it difficult to realize a process marked by impartiality and equality. Moreover, the argument of this section underlines the main claim in this chapter that the difference between substantive and procedural democracy

is smaller than is commonly assumed and that the differences that still remain ought not to be exaggerated in conceptualizing a legitimate political order.

## **5. Concluding Remarks**

The starting point of this chapter was the stark contrast often drawn between substantive and procedural democracy. We saw how this constituted a major obstacle to reconciling liberal constitutionalism with other influential strands of democratic thought. I then developed two arguments against thinking of the differences between substantive and procedural democracy as impossible to surpass. The first argument stated that the origin of both procedural and substantive rights tends to be the same. Also, it is difficult to make a firm distinction between these two set of rights. The distinction between substantive and procedural rights seems to be more artificial than real, and accepting procedural rights at least gives an additional reason for accepting more substantive rights, too. The second argument drew an analogy between contractualism and deliberative democracy and emphasized how both these strands of democratic thinking stress the importance of a political process abstracted away from biases and partiality.

Moreover, these two ways of thinking about democracy share many of the same ideals and underlying thinking and thus, I argue, can complement one another rather than be seen as two opposed extremes. Furthermore, drawing the analogy between contractualism and deliberative democracy leads us to define the scope of contractualism more sharply. However, when the ideal circumstances of deliberative democracy resist realization (which they always do to some extent), then there is room for the hypothetical reasoning found in contractualism (and thus for embedded constitutional rights). Therefore, the scope of contractualism is confined to situations and questions that cannot be adequately answered through actual deliberations. This account of the scope of contractualism also establishes that contractualism offers a smaller threat to deliberative democracy than often assumed. We have also seen in the last section that the analogy can be sustained even if there is an important difference between actual deliberation and the ideal conditions of contractualism. One might want to say that it is exactly because of this difference that deliberative democracy and contractualism can complement each other and work in tandem, rather than being bitter adversaries.

At this stage of the argument we have arrived at an understanding of reason in liberalism and contractualism. We have also arrived at an understanding of what justice



requires of democracy, and we have finally seen, in this chapter, that substantive rights of the kind required by contractualism are not a decisive obstacle to a democratic political order. Therefore, the next step of the argument is to arrive at a precise formulation of how these three elements can be combined to constitute a legitimate political order, and in the next chapter, I will try to draw the contours of how a democratic order and rights together constitute a legitimate political order.

## CHAPTER SEVEN

### A Liberal Democratic Order

*Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own Consent. The only way whereby any one devests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of Properties, and a greater Security against any that are not of it... When any number of Men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politick, wherein the Majority have a Right to act and conclude the rest.*

John Locke<sup>28</sup>

The central ideas of liberal constitutionalism are not the invention of the 20th or the 21st Centuries. Rather, the seeds were sown in the philosophy of John Locke. One reason for introducing this chapter with this famous passage from Locke is that in an important respect what concerned Locke (and what has been an important strand in liberal thought ever since) is why a legitimate political order is also a democratic order. This underlines what has been pointed out earlier in this thesis, namely that the relationship between liberalism and democracy is an intimate one, and that liberalism has been important in developing moral justifications for a democratic order. I want to draw attention to these influential strands of thought in this chapter as the crucial task of the chapter is to develop an understanding of this link between liberalism and democracy by outlining how the two requirements of justice – a democratic order and fundamental rights – can be combined to constitute a legitimate political order.

The first section of the chapter sets out the characteristics of this order, called *deliberative proceduralism*, and expands on their different implications. In section two I revisit the two cases discussed in Chapter three – equality of opportunity and group rights – and show how the democratic order developed in section one can deal adequately with these two cases. This assessment will give an idea of how deliberative

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<sup>28</sup> *Two Treatises of Government*, p. 330-331.

proceduralism works when applied to actual political questions. Although, the discussion of these two cases aims to show that the model's solutions to these issues are adequate, that does not mean that the model is beyond criticism or that objections cannot be levelled against it. What I aim to show is more the plausibility of a liberal constitutional framework that can be subject to further refinement rather than claiming that it is beyond criticism. Sections three and four seek to answer two objections that can be levelled against the model defended in this chapter. The first objection holds that the liberal democratic order advanced here is too weak because of its soft stance on social justice and weak notion of public reason. The second objection argues that it is impossible to move beyond a political order based on mutual advantage and that the framework put forward in this thesis is unable to have any chance of being realized in any actual society.

### **1. A Model of Democracy: Deliberative Proceduralism**

Balancing the principle of liberal legitimacy with the competing demands from diversity requires impartial procedures, political equality, and a set of political and civil rights. Even with these requirements in place, that does not mean that all the actual decisions made by a democracy will necessarily conform to a substantive theory of justice. Nevertheless, impartial procedures and a strong notion of political equality should ensure that unequal power relations will not affect the political process unfairly. I believe this model offers a framework for public decision-making that is procedurally just and simultaneously protects the basic interests of the individual, which is precisely what justice requires.

From an ideal perspective the following three conditions must be fulfilled to call a political process fully democratic from the position of liberal constitutionalism:

1. *Impartial democratic procedures*: it is necessary that the democratic process at all stages is based on impartial procedures, which do not provide any citizen, groups of citizens, or parties, with unfair advantages. Impartial procedures are taken to mean that an unequal distribution of resources (understood as, for example, financial, intellectual, and cultural resources) cannot be translated into political power that can determine the outcome of public decision-making.
2. *Political equality*: each citizen ought to have an equal opportunity to influence the political process leading up to and at the actual decision-making stage. Equal

opportunity here also includes an equal opportunity to be elected to public offices. This principle is grounded on the equal intrinsic worth of a person. An equal opportunity means that each citizen ought to have real equality of opportunity to influence the political process if he or she chooses to engage in the political process.

3. *Basic civil and political rights*: every citizen is entitled to an extensive set of civil and political rights. This set of rights must guarantee the necessary political rights for active participation in the political process on equal terms. This set of rights must also protect the basic interests of the person such as integrity and freedom of the person. This set of rights defines the legitimate limits of political interference.

As formulated here, these conditions sound extremely strong and demanding. One might think that it would be impossible to realize these conditions in actual democratic societies and hence that this model is liable to the same criticisms as those levelled against 'politics as consensus' in Chapter two. I agree that the formulations of these three conditions are ideal and demanding, but I will now elaborate on what they actually require in practice to show that these conditions constitute a middle ground between coordination and consensus theories. It is reasonable to assume some room for civil disobedience, and that the citizens do not have to accept the outcome as the common good or as maximizing utility. All they are asked to accept is that a given outcome is the legitimate outcome of a fair political process.

Starting with impartiality, a democratic order requires impartial procedures for decision-making, because it is unjust that those with access to more resources can determine the outcome of political decision-making. Where those with more resources are able to do this, that undermines the idea of the equal intrinsic value of each person, and it might result in the implementation of principles that could reasonably be rejected in a contractualist thought experiment. Furthermore, the state and the political system must be neutral between different conceptions of the good. The basic requirement is that the state and the democratic process should not be built around or presuppose support of a specific moral, philosophical, political or religious ideal. The purpose of the state should not be to promote certain values, religions or philosophical views. In addition, this ought to be implemented in the workings of the political system, implying that ethnic, religious and political groups are not discriminated against by the majority, or by influential minorities.

To see more clearly what this means I will now discuss two cases in relation to religion. It is clear that impartial procedures rule out that a fully democratic society can have an established or official church promoting a particular religion. Obviously, this creates some hard cases, such as the UK and Norway, which both have established churches. As it happens, the state does not particularly promote Christianity in either of these countries, and both offer reasonable opportunities for other religions and churches to flourish. That is, even if these countries nominally have established churches, their actual practices do not depart much from those that would obtain were there not an established church. Thus, although established churches – such as those in the UK and Norway – are ruled out in principle by the ideal of impartial procedures, given the practices in these two countries formally separating the state and church might not be an urgent political demand. In societies where an established church or religion is promoted in more ‘evangelical’ ways a separation of the state and religion obviously becomes much more urgent.

Of course, even if an established religion is ruled out, that does not mean that certain laws and policies may affect different religions differently. For example, the fact that one religious group has its holy days recognized as public holidays whereas another group does not, does not necessarily mean that the state is partial. Deciding upon public holidays is a question of the coordination necessary to make society work smoothly, and it can in principle be organized in a wide range of different ways. In order to make society work more smoothly it is not unreasonable to recognize the holidays of the majority religion as public holidays. The critical point is that the justification for organizing public holidays in this way must appeal to public reasons and not, say, to the truth of the religious doctrine that underwrites those holidays. Having Christmas day as a public holiday because the vast majority of citizens happen to be Christians (and many of those who are not nevertheless wish to enjoy the Christmas season as a secular holiday) is very different from having it as a public holiday because the state recognizes the birth of Christ and endorses the claim that His birth should be celebrated.

It follows from this that such decisions are subject to democratic control and are thus liable to be changed if the majority religion changes or a different, better, solution to the coordination problem presents itself. One might object that there is no principled difference between an established church and recognizing a particular religious group’s holy days as public holidays and thus that if an established church is

rejectable, then recognizing a religion's holy days as public holidays must be rejectable too. However, there are both quantitative and qualitative differences between the two cases. An established church is a systematic and organized way to offer one religion advantages relative to other religions. The issue of public holidays is far less significant; it is more a question of making society work smoothly, and it can be organized in a wide range of different ways. As noted above, the fact that a law, practice or policy is not impartial in its impact on different parts of the population does not automatically mean that it is unjustified. To make use of Rawls' distinction between restriction and regulation of a liberty (Rawls: 1996: 295) I will say that recognizing one faith's public holidays as official holidays does not restrict freedom of religion, but constitutes a regulation of this important principle. The establishment of an official state church is qualitatively different because it is hard to see what justification could be given for it that would not appeal to some particular conception of the good. There is a (justifiable and public) reason to have public holidays, and given that, there are some good (and again justifiable) reasons to have them on the days that suit most people. There is no obvious equivalent public reason to have an established church.

This discussion of the implications of the ideal of impartial procedures aimed to show both that the ideal of impartiality is deeply embedded in this model of democracy and that even if a law, practice or policy affected different parts of the population differently that does not necessarily make it unjustifiable as long as it can be understood in terms of politics (for example, the need to solve some coordination problem) and is the outcome of democratic decision-making. The important point is that the outcome of the coordination could equally well have been different and affected another part of the population in a negative way. Thus, different impact is not in itself unjustifiable.

Moving on to political equality, real (and not merely formal) political equality means that votes should count roughly the same and that those with views on an issue ought to have ample opportunities to voice their concerns. Achieving political equality therefore requires a strong element of deliberation. In addition it also requires a high level of impartiality as outlined above. In fact, political equality is an important aspect of impartiality and these two ideals are connected as impartiality often requires equality. Consistent with the conclusion above concerning the different impact of laws, political equality presupposes treatment as equals, not equal treatment

(understood as identical treatment (Dworkin: 1977: 227)). It is also noticeable that deliberative practices play an important role in ensuring real political equality and not merely formal political equality. Formal political equality is already in place in most democracies, but it is uncontroversial to claim that most current democracies lag behind in translating formal political equality into real political equality as certain influential groups often have more influence than their numbers suggest they should. Thus achieving real political opportunity is therefore a challenge for most current democratic societies.

Even with impartial procedures and political equality in place, the outcome of the political process might violate citizens' civil and political rights. These rights play an important role in trying to ensure that unequal bargaining power between different groups in society is not translated into differences in political power. Civil and political rights also seek to protect vulnerable minorities in cases where a majority might violate some of their fundamental interests. Furthermore, a set of civil and political rights is important also because even if the political process seeks to be impartial and realize political equality through extensive deliberations these ideals will always be realized in imperfect ways. A set of civil and political rights may serve to protect individual rights in cases where the political process fails to be impartial and to uphold the ideal of political equality. Finally, a set of civil and political rights sets some limits to public decision-making and seeks to ensure that individuals have opportunities to pursue their conceptions of the good and have a sense of control over their own lives.

It is important to see the important role a set of civil and political rights plays in helping liberal constitutionalism avoid the two problems associated with politics as coordination: mutual advantage and no limits on public decision-making. It is also noticeable that apart from a set of civil and political rights this model of democracy puts few restrictions on the democratic process and public reason. There is no demand for consensus and no controversial notions such as a strong understanding of the common good or of the objectivity of political judgements. From this it is clear that the liberal constitutional model advanced here is substantively weaker than politics as consensus but also substantively stronger than politics as coordination. We can also see from the discussion in this section that the actual content of the democratic process is closer to deliberative democracy than pluralism, but the rejection of a strong understanding of the common good and the establishment of civil and political rights

ensures that many of the controversial aspects of deliberative democracy are ruled out. This model thinks of democracy first and foremost as a process of impartial procedures where wide deliberation and participation are emphasized. Thus, we can call this model of liberal constitutionalism, *deliberative proceduralism*.

Deliberative proceduralism constitutes a middle ground between the competing democratic theories of pluralism and deliberative democracy. Occupying a middle position in this way is how liberal constitutionalism seeks to satisfy the liberal principle of legitimacy and the demands that emerge from pluralism and diversity. The demands from pluralism are satisfied through a wide scope being left for democratic decision-making, by applying few constraints on the notion of public reason, and by rejecting a strong understanding of the common good.

In a sense politics as coordination scores better on accommodating pluralism than deliberative proceduralism as it puts hardly any constraints on the notion of public reason, rejects civil and political rights, and does not endorse a notion of the common good. Similarly, politics as consensus scores better on liberal legitimacy by emphasizing the importance of consensus in the political order. However, the constraints built into making a political order legitimate are difficult to square with the competing demands of pluralism. Hence, politics as coordination is too weak, and politics as consensus is too strong, and the challenge is thus to find a middle way that builds on the best of both of these theories whilst avoiding the different pitfalls into which each slips. If such a theory can be found, that seems a plausible solution for liberal constitutionalism. What I have tried to do in this thesis is to articulate precisely such an alternative, and deliberative proceduralism as outlined in this section is the result of trying to articulate an alternative to coordination and consensus. In the rest of this chapter I will try to defend the plausibility of this model.

In the next section, I will revisit the two cases discussed in Chapter three – the issue of group rights and equal opportunity – to see more clearly how deliberative proceduralism works when applied to real cases. These two cases do not completely determine how the model works in all possible cases, but they are both highly controversial cases in contemporary political philosophy and if plausible answers can be offered on these two issues, then that means at least that this model is relevant for how we think about some of the basic questions of justice.



## **2. Equal Opportunity and Group Rights Revisited**

We saw in Chapter three that justice as impartiality appeared to have relatively modest substantive ambitions. An important feature of the theory was precisely that it left wide scope both for individual discretion – through the distinction between first-order and second-order impartiality – and for democratic decision-making. Given this emphasis on just procedures and basic fundamental rights, I argued that it was surprising to see the detailed implications Barry derived from his theory on questions of equal opportunity and group rights. The main purpose of the present section is to revisit these two cases from the perspective of deliberative proceduralism. As will be clear, the answers suggested by this model are significantly more open-ended and flexible than the answers to these questions discussed briefly in Chapter three. I will also argue that the answers I will set out on these two issues are still firm enough not to be in tension with the requirements of justice as defined by justice as impartiality.

We saw in the discussion of equal opportunity in Chapter three that socio-economic inequalities had a potentially enormous impact on people's lives. Moreover, we saw that in response to this fact Barry argued strongly in favour of equalizing the environment of children as early as possible and as much as possible in order to realize equal opportunity. Finally, he held that this conclusion followed from the central tenets of justice as impartiality. I argued that although the response from Barry was not required by justice, it was nevertheless consistent with it. That is to say, justice as impartiality does not require a response of the kind favoured by Barry, but it does not rule out such a response as consistent with the theory under certain circumstances. So, if justice does not require equalizing children's environment as much as possible and as early as possible, then what does justice actually require in terms of equal opportunity?

Simply put, the answer is that deliberative proceduralism requires that the conditions for a just political system described in the previous section are upheld. This means that justice does not require redistributive schemes such as an extensive welfare state or universal basic income. Questions of social justice are questions dealt with in the political process, and deliberative proceduralism does not require specific schemes or policies. Part of what a just political system requires is that all citizens have equal opportunity to participate in politics and to influence the democratic process. Redistributive measures (additional school spending on schools in poor areas, etc.) can be invoked to ensure equal opportunity to participate in the political system, but are

not required to create equal opportunity as defined by Barry above. Once fundamental rights and equal political opportunities are guaranteed, then that is enough to satisfy the model of democracy I present here, and no more redistributive schemes are necessarily required. Therefore, we can conclude that deliberative proceduralism does not require specific principles to achieve social justice. Furthermore, we saw in Chapter three that justice as impartiality argued persuasively against leaving questions of social justice to be settled by the courts as that would effectively take the content of ordinary politics away from parliament and instead have it decided by judges. Also, it would mean that courts would decide the allocation of a vast amount of the government's budget, which has the same effect of taking decisions out of politics and placing them with the courts. The idea of leaving social justice to the ordinary course of politics as suggested above, is consistent with thinking that social justice should not be settled by the courts.

Against this conclusion one might object that the conditions of a just political order are so ideal and demanding that they cannot be realized. Instead it is necessary to resolve social justice through hypothetical reasoning and invoke a principle of strong socio-economic equal opportunity in the constitution since the political process itself will never yield outcomes within the bounds of justice. A second objection is that socio-economic equal opportunity has been one of the defining issues for liberalism in modern times, and simply to reject this principle in this way and to leave it to ordinary politics is simply to reject it as a principle. A third and related objection is that the answer given in this section is a blow in the face to all those who are disadvantaged by being denied equal opportunities, and who are disadvantaged in the job-market and in the educational system, because they do not enjoy the same advantages as other people with comparable skills and motivation. Furthermore, the answer I have outlined seems to undermine the seriousness of the increasing socio-economic inequalities in contemporary Western societies. These are powerful objections, but I believe that they can all be answered.

In response to the first objection my reply is to grant that the conditions for a just political system set out in the previous section are demanding, and they require more of a democratic system than most actual democratic systems require at present. However, that does not mean that they are unrealistic. The conditions outlined are less ideal than those required by some versions of deliberative democracy – for example, those of both Habermas and Cohen – that have been discussed in this thesis. For

example, consensus is not required to make decisions. Instead it is required that the process leading up to a decision ought to reflect the diversity of opinions and interests on a certain issue and that superior economic power ought not to translate into more political power.

The requirements of deliberative proceduralism are, of course, significantly stronger than those of Waldron's coordination based theory. Deliberative proceduralism occupies a middle ground between two relatively extreme alternatives. The conditions of deliberative proceduralism suggested in this thesis actually mean that the theory embodies weaker requirements when compared to most liberal and democratic theories. Therefore, the requirements are not too demanding to be realized in the real world. When they are realized, they should be sufficient to deliver policies that are consistent with justice although, of course, should they fail and proposals pass that violate fundamental rights, then there will be the check of the constitution to protect the basic interests of the citizens.

With respect to the second objection, it is true that socio-economic equal opportunity has been one of the defining features of liberal egalitarianism in recent times and one of the issues that has received the most attention in discussions of social justice. That said, to judge from the discussion of social justice in Chapter one, there is no consensus on what socio-economic equal opportunity actually requires, or for that matter, on what is required by social justice in general. What I have described are the contours of what a reasonably just democratic system requires, and part of those requirements are equal political opportunities that are not merely formal, but real. That in itself is a fairly strong requirement and is, in a sense, a democratic formulation of what equal opportunity requires.

Recently, a wide range of imaginative proposals of how to realize social justice has been put forward and many of them, if not most of them, would be consistent with justice. Therefore, social justice is achievable not only through equal opportunity, but also through a range of other schemes as well. Examples of some of these schemes are universal basic income (Parijs: 1995) and the stakeholder society (Ackerman and Alstott: 1999) just to mention a couple. All these schemes would be consistent with deliberative proceduralism, and it is not clear why one of them should enjoy a privileged status. So, although, socio-economic equal opportunity has been an important element of liberal egalitarianism for a long time, it is not the only one, and it is far from clear that it should enjoy a privileged position. Thus, a principle of socio-

economic equality of opportunity is not a constitutional essential in the same way as freedom of religion is a constitutional essential; there is simply no reason to think that equality of opportunity enjoys a privileged status compared with other schemes of social justice. The crucial difference between the set of civil and political rights and social rights from the perspective of liberal constitutionalism is that the former is necessary for the workings of the political system itself, while the latter is not required for securing a democratic order or for protecting the basic interests of a person.

As to the third objection, the force of the objection is that my interpretation of liberal constitutionalism does not offer substantive principles to answer questions of social justice. As it happens, I have a great deal of sympathy for the claim that addressing growing socio-economic inequalities is important. However, it is not clear that this requires us to pursue the line taken by Barry on this issue. There are two important concerns to bear in mind when assessing the lack of substantive principles in my interpretation in comparison with the line chosen by Barry. The first point is that realizing socio-economic equal opportunity must not violate the basic interests of the person or the distinction between first-order and second-order impartiality. This was identified above as a danger with Barry's interpretation of this principle in WSJM, which argued that equal opportunity required equalizing children's environment as early as possible and as much as possible. As was noted in the discussion in Chapter three, this opens up the potential for intrusive policies that would conflict with the importance agents give to feeling in control of their own lives.

In short, Barry's robust interpretation of the equal opportunity principle could have potentially intrusive effects on how upbringing and family life is organized in most democratic societies. Choosing such an approach would be to try to rectify one injustice by invoking another. Moreover, the cure may be worse than the disease. A second point is that the framework I suggest is one where the political process would be significantly different from the current practices of many Western democracies. This framework would offer fairer terms for political discussion and offer weak and marginalized groups equal and fair opportunities to raise their concerns. Therefore, even if a specific substantive principle is left out, that does not mean that the theoretical framework does not have anything to say about social justice. In addition, it should be remembered that this relatively soft stance on social justice is taken against the background of a democratic system that would be substantially different from current democratic practices in most Western societies. This makes a difference

as a more ideal political system might produce different outcomes than those produced by current democratic practices.

These replies seek to establish and defend the idea that what justice requires is more minimal than what is consistent with justice, and that social justice is the ‘stuff of politics’. This is an important element in taking democracy seriously. If the realization of social justice required specific policies in the way defended by Barry, then the scope for democracy in liberal constitutionalism would be very limited. This would make it even harder to reconcile democracy with justice. Civil and political rights are difficult enough to square with popular sovereignty; extending the scope of justice to include social rights would put even firmer limits on the role of reason in liberal constitutionalism by relying on controversial ideals of social justice. The stance taken on social justice by deliberative proceduralism makes it easier to reconcile justice and democracy because it extends the scope of democracy instead of narrowing it.

Turning to the issue of group rights, we saw that the question confronting us is whether groups (ethnic, cultural, religious, etc.) ought to be given exemptions from general applicable laws. A second related question is to what extent groups ought to be granted group specific rights that apply only to members of the group (for example, specific rights given to indigenous groups to ensure the group’s identity is protected). Barry’s approach was hostile both to the granting of exemptions and to the granting of group specific rights, and again his claim was that this approach was derived from the framework found in justice as impartiality. The question to answer is: how would deliberative proceduralism deal with these issues? Must group sensitive rights be rejected or not?

The answer to this question is both ‘yes’ and ‘no’. It is ‘yes’, if such rights violate fundamental rights or the democratic order as specified in the previous section. The answer is ‘no’, in so far as such rights do not threaten the democratic order or fundamental rights. The central idea is that in cases concerning essential rights and essentials for the democratic system it is imperative that both exemptions from generally applicable laws and group specific rights are rejected. In non-essential cases, exemptions and group specific rights may be granted. In both cases, this decision is to be made by the legislative assembly, as this assembly decides the positive law of the country.

This raises an important question about how to distinguish between the essential and non-essential cases. It is difficult to offer specific and detailed guidelines or principles for how to draw this distinction, but this is where judicial review and the courts have a role to play in the democratic system. Assuming that the constitution lays out the basic rules of the political system and the set of embedded fundamental rights, it is the judiciary that will interpret the content of the constitution and the extent to which a specific law is unconstitutional (or not). This is certainly an imperfect procedure, but it is attractive both from a liberal constitutional and a practical perspective.

Of course, this is precisely the move many democratic theorists such as Dahl and Waldron reject as illegitimate. However, the point from a liberal constitutional perspective is that judicial review is acceptable if it can protect against outcomes threatening to undermine the democratic system itself. The set of fundamental rights has a democratic role in addition to protecting citizens' basic interests. It serves as a guarantee for the minority that, whatever the outcome of the democratic process may be, it will not violate or threaten their fundamental interests. This function ensures trust and support for maintaining the democratic system even when a minority stands to lose. Although this means that democratically made decisions can be overridden by the judiciary, one point of this thesis has been to argue that this is not undemocratic because its main role is to protect democracy and because, on my interpretation of liberal constitutionalism, the role of the judiciary is modest.

One may object to this solution and say that this seems to give proponents of group rights what they want and at the same time to give liberal constitutionalists what they want. But in the end the entire system is tilted towards liberal constitutionalism and will produce liberal constitutional outcomes all the way through. Hence, liberal constitutionalism of the kind advanced in this thesis always has an upper hand and when it comes to actual decision-making it does not give much leeway to group rights at all. It is of course non-negotiable for liberals to compromise a just political system and fundamental rights, but that does not mean that liberals necessarily are committed to the uncompromising attitude adopted by Barry on this issue. The approach described above would allow for much more than mere anomalies. Furthermore, anchoring the decisions concerning these issues in the parliament itself would offer more opportunities for group sensitive rights. But, in the end, the decision would be left to the parliament and there are no guarantees that either side on these issues will

prevail, it all depends on the possibility of each side to offer reasons that are compelling and that will receive the support of a majority. Therefore, the possibilities for invoking group sensitive rights must be said to be greater than in the position stipulated by Barry.

To summarise briefly how deliberative proceduralism deals with the issue of group rights: group rights and exemptions can be granted as long as they do not threaten the democratic order or violate fundamental rights. Judicial review plays a (modest) role in determining whether a particular law conflicts with fundamental rights and undermines the democratic order. Group rights are in the end to be dealt with by democratic decision-making. This does not grant exemptions or group specific rights in itself. Instead the important point is that this is a question left to democratic deliberation.

We have now seen how deliberative proceduralism would respond to the issues of equal opportunity and group rights. The solutions it proffers are sensitive to both the importance of democratic legitimacy and popular sovereignty on the one hand, and to the importance of protecting the basic interests of the individual on the other. And that is exactly what justice requires. The theoretical framework outlined in the previous section and the applications of it in this section might be criticized for being both too weak and too strong. Too weak, because it may not be able to avoid power and relative bargaining power to determine outcomes; too strong, because in practical politics it is impossible to move beyond a political order based on mutual advantage. Over the next two sections I will discuss how these two objections affect deliberative proceduralism.

### **3. The Liberal Dilemma I: Too Weak?**

A central concern for liberal constitutionalism is to find a notion of reason that is neither too weak nor too strong. If the notion is too weak, then the theory will not offer sufficient protection to the fundamental interests of persons, and will allow unequal bargaining power to influence the outcomes of public decision-making. Thus, if liberal constitutionalism is too weak it collapses into a mutual advantage theory and is essentially a version of politics as coordination. The aim of the present section is to discuss whether deliberative proceduralism is too weak, and thus fails to protect against mutual advantage and the exploitation of relative bargaining power. To see if the account of liberalism defended in section one meets the requirements of a liberal

theory it is necessary to assess the extent to which it meets the requirements of liberal legitimacy and pluralism.

To start with, there are at least four reasons for thinking that deliberative proceduralism is not strong enough to offer a justifiable political order.

1. The political process I have outlined favours the articulate and educated over those who are less articulate and less educated because I emphasize how the political process involves extensive deliberation, which will favour those who can be convincing in argument. Or, to put it crudely, my account favours the middle class over the working class. The critic may then allege that whilst I argue for real, and not just formal, political equality, I endorse political practices that make it much harder for working class (and other marginalized groups for that matter) groups to voice their concerns, because educated and confident middle class groups will feel more comfortable on the political stage as it is defined in my model. Hence, talk of real equal opportunity is illusory, and the end result is mere formal equal opportunity. This means that the model fails on its own terms.
2. A second criticism may be that no notion of the common good is given within my account. An objection might be that to leave out any notion of the common good – even a weak one – leaves the theory vulnerable to mutual advantage and relative bargaining power; without a shared common good, the bonds within society are not strong enough to avoid the possibility that powerful groups will use their superior bargaining power to skew the outcomes of the political process to their own advantage. My emphasis on thinking of the democratic system itself as a common good is too weak because it is merely procedural, and does not focus upon any of the substantive outcomes of the process. The substantive outcomes matter, because they give the actual content to the political system, and it is the content and the outcome that matter to people in the end.
3. A related point is that deliberative proceduralism requires only a minimal notion of consensus, which focuses on the justifiability of the democratic system and a constitution protecting basic interests. A workable political order requires widespread support not only on the fundamental procedures of the political system, it might be said, but also on some of the substantive outcomes. If consensus cannot be achieved – perhaps not on all issues – but at least on some political issues of great national importance, then this will undermine and



marginalize the support for the political system from those parts of the electorate who believe their views are not properly taken into account. In short, a political system with only a limited place for consensus is inherently unstable.

4. Finally, there are few restrictions on public reason. What counts as a public reason is not clearly specified and without the same strict limits as are given by Rawls (1996 and 1999b) and Habermas (1991 and 1996), this will be exploited by those who want to use populist and simplistic political language to gain support for the outcomes most likely to benefit their particular interests. This again opens up the possibility of threat advantages affecting, and of powerful groups manipulating, the political process to their advantage. In the long run, the political system runs the risk of being undermined and losing legitimacy and support among the wider public.

If these criticisms are sound, deliberative proceduralism is not much different from the theory advanced by Waldron and discussed in Chapter two. In fact, the similarities are striking. First, on this liberal constitutional model it is possible that many citizens will find themselves living under a political order with which they strongly disagree. Furthermore, like Waldron's model, my account does not include any substantive principles of social justice, has no strong requirements of consensus, or requirements in relation to the common good. These points are consistent with the stress on the idea advanced both by Waldron and in this thesis that disagreement is an important part of modern political life. Given that, the ambitions of political theory must be curbed to avoid reliance on premises that can reasonably be rejected by parts of the electorate.

Nevertheless, concerning 1) it seems hard to deny that the educated classes might have an advantage in politics as they have more training and are more articulate, and they also possess more of the social and cultural capital needed to succeed in politics. However, that seems to be the case in any political system in which deliberation is a part, not only deliberative proceduralism. The important point here regarding deliberative proceduralism is that it presupposes that all groups of the population have equal access to education and will be able to protect their interests. There might always be differences between, for example, a law professor and a heavy industry union leader regarding knowledge of the political system, but in so far as unions (or other marginalised groups in society) possess the necessary resources (rights, financial

and intellectual resources) to protect their basic interests, then differences and inequalities are permissible. Regarding 2) - 4) above, I believe they can be rejected as they are incompatible with the pluralism and diversity in modern Western societies. More communitarian societies may be compatible with a stronger conception of the common good, consensus and public reason. Deliberative proceduralism claims that a robust defence of civil and political rights will protect persons' interests from violations even in a society with weak conceptions of the common good, consensus and public reason. This is also one of the main dividing lines between deliberative proceduralism and politics as coordination, which does not offer such protections. So, despite some similarities with politics as coordination there are at least four important differences.

1. The first substantial difference is that my model requires a democratic order based on impartiality and equality. We saw that Waldron also emphasizes the importance of impartiality, but his notion of impartiality is ambiguous and he fails to say how it should be understood. Moreover, it is clear that for Waldron even the democratic system itself is up for grabs. Therefore, the political system that springs out of Waldron's political theory will not necessarily be a democratic order based on impartiality. Regarding equality we saw that, on Waldron's model, coordination of behaviour and the advantages a person received from social cooperation were decisive in defining a legitimate political order. On this view relative bargaining power is allowed to play an important role, which leaves little scope for considerations based on equality. Thus, with respect to both impartiality and equality the account defended by Waldron is less robust than deliberative proceduralism.
2. A second difference is that, on my account, there are strict limits on the reach of government through the distinction between first-order and second-order impartiality, while Waldron's model has no barriers against intrusive policies or any limits to the reach of government. In the model advanced in this chapter it is important that there is wide scope for individual discretion and that individuals have ample opportunities to live their lives in accordance with their conceptions of the good. These rights impose limits on the kind of policies that can be invoked through the political system, but no such barriers are present in Waldron's theory. Deliberative proceduralism therefore offers a substantively stronger version of

liberalism than Waldron's view of politics as coordination games.

3. A third difference is that in deliberative proceduralism the interests of the individual are firmly protected in the constitution, while in politics as coordination no such protection is offered, because the level of disagreement in modern societies makes it impossible to invoke a set of fundamental rights that could be acceptable to every citizen. Waldron claims that it is impossible to find a set of rights that adequately represents and reflects the basic interests of each and every citizen (because there is no shared account of important interests). Although, a set of fundamental rights is bound to be controversial, an important feature of the rights granted by justice as impartiality is that they articulate a basic equality between the members of society and aim to treat competing interests impartially. This latter feature may minimize how controversial the set of fundamental rights is, although it is not enough to avoid the charge of being controversial entirely. Nevertheless, it at least points to an important difference between politics as coordination and deliberative proceduralism.
4. Finally, a just democratic order limits the reach of government and the embedding of fundamental rights curbs the possibility of a political order based on mutual advantage. These measures actively aim to avoid the possibility that the political process will collapse into mutual advantage. An important element of this is that deliberative proceduralism does not think of politics as a coordination game in the first place. When one thinks of politics as a game, one allows notions associated with relative bargaining power and mutual advantage to play an important role as these elements are important elements of modern game theory. Clearly, this perspective is rejected by justice as impartiality, and the model advanced in this chapter is, on all four points, significantly stronger than politics as a coordination game. Hence, the objection that this model is too weak fails at least in comparison with Waldron's model.

Being stronger than politics as coordination does not necessarily mean that the model will satisfy liberal legitimacy and respond adequately to the demands of pluralism. To see how deliberative proceduralism satisfies these two requirements a more precise answer is needed. In order to give a more detailed explanation of how the liberal constitutionalist model defended in this thesis satisfies liberal legitimacy and responds to pluralism, I will argue that these four points constitute a legitimate

political order that no one could reasonably reject, including the worst off in society. The reason for focusing on this group is not because they enjoy a special status within the theory, but because it is plausible to believe that this group might have stronger reasons than others to reject a particular order as oppressive and unjust.

It might be thought that the worst off can immediately object that the political order defended in this thesis does not contain any principles of social justice that ensure their interests are advanced (as they are, for example, by Rawls's difference principle). And assuming that marginalized cultural, religious and ethnic groups also form part of the worst off group, such groups might object that justice requires that they ought to be given rights to support their identity and/or culture as such rights will work against further erosion of their position.

While democratic theorists object strongly that the substantive implications of justice as impartiality are too strong, some liberal egalitarians hold that they are not strong enough. For these kinds of egalitarians, if one grants that civil and political rights are needed to protect the fundamental interests of the individual, then one is bound to endorse constitutionalising social rights as well (Fabre: 1998). In a similar vein it has been argued that a deliberative proceduralist conception of democracy is too weak because it leaves out substantive principles such as basic health care and equal opportunity (Gutmann and Thompson: 2004: 95). Gutmann and Thompson's argument in favour of this stance is – in addition to the well-known argument that just procedures can lead to unjust outcomes – that both substantive and procedural principles are provisional and open to systematic revision (Gutmann and Thompson: 2004: 97). Underlying this claim is the view that procedural and substantive principles are not entirely separate entities and both types of principles rely on the same notion of reciprocity. This interdependence means that it is difficult to reject substantive principles such as equal opportunity and universal health care free at the point of provision from the standpoint of a deliberative theory of democracy (Gutmann and Thompson: 2004: 99).

Drawing on the example of Jones in the transmitter-room, discussed above in Chapter four (section 4), Gutmann and Thompson might argue that offering substantive social rights is an inconvenience for the majority, but is nevertheless required by justice to protect the interests of all. Just as fundamental rights and judicial review could be justified with reference to the transmitter-room example, so social and cultural rights can be as well, as they are of the same importance to potentially

marginalized minorities.

Given that I endorsed the transmitter-room example, it might be claimed that I am also obliged to adopt these claims and thus am forced to agree that substantive rights granted to marginalized economic and cultural groups follow from my model. Hence, the crucial question is: is deliberative proceduralism committed to constitutionalizing social rights after all? This is of great importance, because the issue at stake is what is the difference between civil and political rights that are required by justice and social and group rights that are not requirements of justice?

In replying to this question, an important point to stress is that the model I have advanced seeks to avoid allowing unequal bargaining power to determine the democratic process thus collapsing politics into mutual advantage. If this can be maintained, it will rule out highly exploitative policies and ensure that the worst off in society will have substantively better opportunities to voice their legitimate concerns in the democratic process than they would have in a political order underwritten by mutual advantage. Thus, blocking unequal bargaining power and mutual advantage goes a long way in itself to satisfying the concerns of the worst off regarding social rights. Furthermore, by defending equal democratic rights, deliberative proceduralism defends the position of the least well off. Finally, given reasonable disagreement over these rights claims, social and historical contingencies might influence what justice requires and these issues are difficult to settle through philosophical reasoning and are better suited to being resolved through politics. This conclusion does not mean that all social and group rights claims are unfounded and rejectable, but only that they are not required by justice in the same way as civil and political rights. Hence, many social and group rights may be consistent with justice and these may well be implemented democratically as part of the framework of politics, but they are not required in any strong sense.

What I hope to have established in this section is that even if the model advanced in this chapter does not require any social rights it is not a weak model. It may be too weak for those who want to constitutionalize social rights, but such a demand is controversial and subject to even more reasonable disagreement than the demand to entrench a set of civil and political rights. As for the objection concerning the interdependence of procedural and substantive principles, I agree with Gutmann that procedural and substantive principles are closely connected (see Chapter six, section two). The main difference between deliberative proceduralism and deliberative

democracy on the issue of including social rights is one of degree, and I have argued that this difference can be maintained.

However, overcoming the objection that deliberative proceduralism is too weak, does not yet mean that the theory fully satisfies the demands of liberal legitimacy and responds adequately to pluralism. A second objection is that in fact the model is too strong; that it belongs in the same camp as Rawls and Habermas in making the mistake of believing that it is possible to move beyond a political order based on mutual advantage. If this objection is correct, it means that deliberative proceduralism requires unreasonably strong conditions that are either controversial or unworkable in modern pluralistic societies. The next section is devoted to discussing the merits of this objection.

#### **4. The Liberal Dilemma II: Too Strong?**

It has been an important aim of this thesis to point out that a just political order is one that is based on more than mere mutual advantage. Thus, the previous section outlined how deliberative proceduralism differed from Waldron's mutual advantage theory. Now, that might give the impression that mutual advantage is defeated and the challenge from that corner of political philosophy is overcome. However, that is a premature conclusion as there is a second objection that can be made from the perspective of mutual advantage. This second objection penetrates deep into the heart of theories based on impartiality, and it seems hard to avoid its force. Briefly stated it says that liberalism, constitutionalism, and democracy only work in ensuring a stable political order when, and *because*, they are to the mutual advantage of the most important political groups in society.

This is a particularly hard-hitting objection because it undermines the central theoretical and practical tenets advanced in this thesis in both the form advocated by Barry and as captured by deliberative proceduralism. We have seen how justice as impartiality was, to some extent, developed in response to the defects of justice as mutual advantage. In contrast to mutual advantage theory, justice as impartiality holds that liberalism, constitutionalism and democracy are justified because they champion impartiality and equality, and contain the tools that can offer justice to those who are marginalized in the wider society. Moreover, the development of justice as impartiality was not meant as a purely theoretical intellectual exercise, but also to point towards how a legitimate political order can be realized in practice. One of the

main reasons for some of the scepticism expressed about the theories of Rawls and Habermas was that they were impractical. Now, the allegation is that justice as impartiality and deliberative proceduralism are in the same category. In the rest of this section, I respond to this objection.

In its most general form the objection states that ‘liberalism, constitutionalism, and democracy, as well as, specifically, liberal constitutional democracy all work, *when they do*, because they serve the mutual advantage of the politically effective groups in the society by coordinating those groups on a political and, perhaps, economic order’ (Hardin: 1999: vii-viii, original emphasis). Essentially, the claim made here by Russell Hardin is that politics is only about coordination. Thus, despite appearances to the contrary, ‘liberalism, constitutionalism, and democracy are mutual-advantage theories’ (Hardin: 1999: 1) since they are simply ways of providing order. If they do so successfully – that is, in ways that benefit most of the participants – then they will be stable; they will, as noted above, ‘work’. In defending these theories, then, all that can be offered is an account of how they work better than any alternative. What is not at stake is that they ‘meet some ideal standard of the good or the right’ (Hardin: 1999: 319).

It is important to observe that Hardin claims that he is making an explanatory and not a normative claim (Hardin: 1999: viii). That is, he offers an account of how people actually behave and of how politics actually works. This means that he is not telling us how politics ought to work or how people ought to behave politically. In short, Hardin tells us that self-interest governs politics as a matter of fact. Despite the explanatory focus of his account, Hardin goes on to note of impartialist contractualism that, ‘contractualist scholars, such as Thomas Scanlon and Brian Barry, want to claim the universal appeal of their conclusions... I think no conclusions in this realm have universal appeal’ (Hardin: 1999: 38). This claim is not explanatory, but is rather concerned with the scope and nature of theorising about politics (it is, in a sense, a meta-theoretical claim).

The impression that Hardin moves between the purely explanatory and the more meta-theoretical is reinforced by his rather dismissive comment about political theorists outside the tradition of mutual advantage: ‘Rousseau, Kant, Scanlon, Barry and others appeal to rationalist or reasonable-agreement claims that cannot convince anyone other than, seemingly, a philosopher’ (Hardin: 1999: 309). Talk about impartiality has, according to Hardin, no appeal outside philosophy. Real politics is all

about coordination games between self-interested parties. As I have aligned myself with the tradition of appealing to reasonable-agreement claims, Hardin's objection, if right, would leave little prospect for the normative arguments put forward in this thesis. Rather, the claims here are empty phrases, and the overall project not worthwhile, as reasonable-agreement is bankrupt both theoretically and practically.

One way to respond to Hardin whilst defending the position outlined in this thesis would be to claim that liberal constitutionalism is, as a matter of fact, the most workable system in the modern societies in which it is established. Moreover, precisely because it is established and the costs of dismantling an existing system to replace it with a new one are very great, it provides a solution to the coordination problem that is to the advantage of most if not all participants (the benefits that might be gained by those who would do better under some alternative arrangement are outweighed by the transition costs of moving to that system). This would be to respond to Hardin on his own territory. However, it is clearly not satisfactory since the account offered in this thesis has been a normative one; the claim is that deliberative proceduralism is morally defensible.

To see the difference, consider the issue of 'a successful coordination on a constitutional regime that does not seem to give equal standing to some group' (Hardin: 1999: 306). For a number of reasons – because of problems of collective action or because they do not have a viable alternative regime – the unequally treated group may be acquiescent and the arrangement may be stable. On Hardin's account, of course, the advantaged group has no reason to unsettle the established order. In this case, were the argument for deliberative proceduralism merely one of mutual advantage, it would fail. The unequal established order is workable and the costs of transition to any other order – including deliberative proceduralism – high.

This contrasts with the argument offered in this thesis for the embedding of basic rights in deliberative proceduralism. That argument hinged on the requirement of impartial justice that people's interests be protected from any threat that might emerge from the practice of democracy. That is, the argument for constitutional rights is explicitly normative.

The question is, why should we believe Hardin's claims that politics is only about coordination and political theory only explanatory? These claims go beyond those made by Waldron (discussed in Chapter two) and, on the face of it, neither is plausible. Much political debate is about what is right and wrong and not about what is



workable or mutually advantageous, and most political philosophy claims at least to be grounded in moral values and to be justified only when it properly builds on those values.

Of course, Hardin can claim that talk of right or wrong in politics is merely illusory or epiphenomenal. Take, for example, the issue of abortion. This contentious political issue does not stand out as primarily a question about self-interest and the debate is carried out in explicitly normative terms. Moreover, the parties to the debate claim that a state that allows or fails to allow abortion is just or otherwise. That is, this seems to be an issue where people disagree over what is right and wrong rather than where different groups are trying to coordinate. Hardin has available to him the response that what is really going on here is that two groups with conflicting interests are vying for position in the establishing of political order. The pro-life group, just like the slave owners in the South of the USA, are trying to push for a constitutional order that includes the banning of abortion or the legality of slaveholding. Their opponents are pushing for the reverse. Talk of right or wrong, and the belief that what needs to be done here is to come to the right answer, is merely the fig leaf that disguises the nakedness of inter-group conflict in a coordination problem.

Given that this response is available to Hardin, it is difficult to see how to rebut his position in such a way as to show it conclusively to be false. It is similar to the argument that sometimes takes place between those who believe in the possibility of altruism and those who wish to reduce everything to self-interest. If I give money to the homeless and believe that I am motivated by impartial feelings of altruism or by demands of justice, I may nevertheless not be able to convince someone who claims that I only think those things, but am in fact motivated by the desire to feel good about myself. In the end, the argument may be inconclusive, but that does not mean there is nothing that can be said. What can be said is that there is no reason to think that the bare self-interest account is plausible, and there are few reasons to believe that what seems so obviously to be the case is not, in fact, the case.

The same applies to Hardin's account, and the purpose of this discussion has been to show that Hardin's arguments that self-interest alone determines politics, and that it is impossible to move beyond mutual advantage, do not need to be accepted. This means that political equality and impartiality can play a stronger role in politics than is assumed by mutual advantage theorists like Hardin. The political order based on justice as impartiality and deliberative proceduralism is not only more realistic than Hardin

believes, it can also be defended from a normative standpoint as not merely workable, but also just.

The ambition of deliberative proceduralism is to balance the sometimes competing demands from justice and democracy. Deliberative proceduralism builds in many elements of mutual advantage and leaves a wide range of issues to be sorted out through the ordinary political process, but ultimately political equality and impartiality can trump mutual advantage if the fundamental interests of a person are threatened. This understanding of political equality and impartiality is plausible because it is strong enough to protect the fundamental interests of the person, yet self-interest and disagreement are allowed to play a role in politics.

Deliberative proceduralism thus steers a middle way between the unjustified pessimism of Hardin and Habermas's and Rawls's unjustified optimism. By being less ideal than both Rawls and Habermas, deliberative proceduralism seeks to be more practical than these two accounts. The interpretation advanced here has paid particular attention to the demands of everyday politics in diverse societies by requiring the weakest possible requirements that are still compatible with impartiality and equality. The 'soft' position regarding distributive and cultural justice can also be said to make the theory more practical, yet without opening up too much space for mutual advantage. By leaving a wide range of questions to be dealt with by ordinary politics, and thus emphasising the procedural aspects of a legitimate democratic order, it is possible to arrive at outcomes that are consistent with what the citizens think. Even if this move does not make the theory as practical as a mutual advantage theory, it aims to present a liberal solution to the problem of how theoretical commitments to impartiality and equality can be combined with practical concerns such as those outlined by Hardin.

What I have offered is, I believe, a balance between the demands of mutual advantage and the ideals of impartiality and equality; a balance that is closer to ideal theorists such as Rawls and Habermas than it is to Hardin and Waldron. Nevertheless, the political order of deliberative proceduralism is far more practical than the theories of Rawls and Habermas. For all that, the ideals discussed in this thesis are far from realized in most democracies in the contemporary world, but the fact that the ideals are not realized does not mean that they can never be realized.

## **5. Concluding Remarks**

This chapter has outlined the central tenets of a legitimate political order, and called this order deliberative proceduralism. We have seen that this model puts stress on the importance of political equality and fair and impartial procedures. Furthermore, when applied to controversial issues such as distributive justice and cultural justice, deliberative proceduralism delivered plausible answers. In the two last sections, I discussed whether the theory was too strong or too weak. Briefly stated, the answer is that the theory is strong enough to avoid the criticism of being too weak. There may be more reason to worry that the theory is too strong. The theory relies on weaker and less controversial notions than other liberal accounts (for example, those of Rawls and Habermas), and this is to the advantage of the theory. In the end deliberative proceduralism, defends an alternative to the unjustified scepticism and optimism found respectively in Hardin as a coordination theorist and Habermas and Rawls as consensus theorists. Striving for gentler and more ideal democracies is an ongoing activity and the present thesis is a modest contribution towards that end. The attempt has been to combine the ideals of impartiality and equality as far as possible with the practical concerns expressed in mutual advantage theory.

## CONCLUSION

The previous chapter set out the structure of a liberal constitutionalist political order based on protection of fundamental rights and democracy. In addition I discussed the political implications of this model called deliberative proceduralism and two objections regarding the plausibility of the model. Thus, the previous chapter delivered an answer to the question raised in the Introduction concerning how commitment to both justice and democracy could possibly be combined in a plausible political order. The purpose of these concluding remarks is briefly to try to summarise the structure of the argument that led us to the model proposed in the previous chapter. In addition, I will take a step back and discuss more explicitly how the arguments in the different chapters contribute to the model presented in the previous chapter. I will end with a brief discussion of the relationship between politics and philosophy that builds on some of the important ideas in this thesis.

### **1. Liberal Legitimacy and Impartiality**

Liberal constitutionalism as I have conceived of it in this thesis has two crucial requirements: fundamental rights and a democratic order. Holding this view does not tell us how to combine justice and democracy. Instead stating that liberal constitutionalism has these two requirements is rather to point out one of the central tensions in combining a commitment to both justice and democracy. To some extent, it is possible to resolve the tension between justice and democracy by rejecting the strong commitment to one or other. For example, we have seen that Dahl's pluralistic theory of democracy sides decisively with democracy rather than justice, and Rawls' theory sides more closely with justice. Siding either with justice or democracy dissolves the dilemma of combining justice and democracy because less attention is devoted to either justice or democracy. Doing so resolves the tension, but simultaneously, that would be the end of liberal constitutionalism as it is often understood. Therefore, for liberal constitutionalism to constitute a distinct political theory it is necessary to sustain its commitment to both ideals. So, it is necessary to search for a solution where both ideals are embodied. The challenge is to combine two competing ideals and still be a plausible political theory. The task of this thesis has mainly been to map out the extent to which this can be achieved or not.

Crucial in this endeavour was to satisfy the two additional conditions that provide the context of liberal constitutionalism: the principle of liberal legitimacy and the demands that arise from political and moral pluralism. These two conditions make the task even more challenging because they put stringent constraints on what a justifiable political order may consist of. Deliberative proceduralism seeks to satisfy the principle of liberal legitimacy through a combined commitment to protection of fundamental civil and political rights, and a democratic order. The demands of pluralism are satisfied through a weak notion of reason and a commitment to democratic deliberation. The principle of liberal legitimacy states that a legitimate political order must be one that can be justifiable to everyone living under it. Deliberative proceduralism seeks to satisfy this principle through universal civil and political rights ensuring the fairness and equality required by mutual respect and moral equality. Democracy is a second element in establishing liberal legitimacy. Political democracy as it is normally understood in modern societies offers equal political rights and strives to realize an ideal of an impartial political process that is not tainted by certain agendas (religious, cultural, economic, etc). Thus, democracy embodies an ideal of fairness and justice that can be justified to those living under such a political order. Furthermore, democracy coheres with the people being the moral (and *de facto*) authority of the laws. This ideal coheres with the premise of mutual respect and equality, by offering each citizen equal political influence on the outcomes of issues of public interest. From the perspective of deliberative proceduralism, this combination of justice and democracy is a happy marriage, but proponents of democracy argue that the limits put in place by civil rights are constraints on the authority of democracy. If liberal constitutionalists took democracy seriously, they would not impose constraints taking political power out of the hands of the people and vesting it in rights outside the reach of ordinary politics.

Because rights outside the reach of politics is undermining democratic authority and there is no consensus over the content of the appropriate set of rights many critics reject the idea of any such constitutionally embedded set. This feature not only creates a problem with respect to the authority of democracy, but also with respect to the demands of pluralism. Like the liberal principle of legitimacy, pluralism poses a serious challenge for liberal constitutionalism. The deeper and wider the political and moral disagreements within a society, the more challenging it is to find a political order justifiable to everyone living under it. Still a democratic system has a

virtue under conditions of disagreement as ideally democratic procedures will give all citizens an equal opportunity to voice their concerns and to influence the public debate. The outcome of the democratic process is supposed to reflect what the majority think of as the right decision. Thus, the appeal of democracy is in fact strengthened by disagreement as it appears as the fairest way to arbitrate under conditions of disagreement. Furthermore, democracy, even under deep disagreement, is able to sustain its commitment to equality.

This thesis started with a discussion of the kind of reasons to which it is legitimate to appeal in public debate in a democratic system. What I have attempted is to describe a political order that ought not to terrify those who believe in the ideal of democracy and who reject the idea of constraining democracy with a set of rights to protect the basic interests of the individual. At the same time, I have attempted to satisfy those who are concerned with justice. This thesis has looked at ways to minimize the tensions between justice and democracy; tensions that threaten to undermine liberal constitutionalism.

An important point to note is that whether the liberal constitutionalist project is plausible or not, given the starting point – justice and democracy, liberal legitimacy and pluralism – the inevitable point to end up is somewhere around the territory described in this thesis. The double commitment to justice and democracy and the additional conditions of legitimacy and pluralism put constraints on liberal constitutionalism and pushes it in the direction of what is described in this thesis. That is because adding these constraints limits the available alternatives for liberal constitutionalism to a political order based around (1) a relatively weak notion of reason; (2) a democratic model emphasising deliberation, but without a strong conception of the common good; (3) the co-originality of civil and political rights and the analogy between contractualism and deliberative democracy shows that the differences between the critics and proponents of substantive rights in the constitution are not as pervasive as often assumed in the debate between these two groups. Given that starting point the destination is likely to be somewhere along the lines of what has been described in this thesis. That does not mean that the model described in this thesis is the only available alternative for a liberal constitutionalist order, but it means that a justifiable liberal constitutionalist order must resemble the deliberative proceduralism I have described. I will now briefly summarise how (1) - (3) help us to offer some tentative answers to the central question of this thesis of how liberal

constitutionalism, and specifically deliberative proceduralism, can combine the commitment to both justice and democracy.

1. Given the pluralistic character of modern societies, a relatively weak notion of reason is necessary to accommodate the political and moral disagreement in society. Convergence of reason can only be expected on a limited number of issues, such as the basic workings of the political system. This includes both the set of civil and political rights and a commitment to democracy. Convergence on these tenets is both the minimum and the maximum of what liberal constitutionalism requires. It is the minimum necessary to sustain a liberal constitutionalist order, and at the same time, the maximum that can be demanded given pluralism. Equal civil and political rights embedded in the constitution are important and reasonable because they help to avoid a political order based on mutual advantage. Thus, equal civil and political rights take liberal constitutionalism a step further beyond a mere *modus vivendi*. However, given pluralism, there is unlikely to be convergence on the actual outcomes of democratic deliberation. This means that liberal constitutionalism does not prescribe any outcomes on specific political issues, apart from issues undermining civil and political rights. Thus, liberal constitutionalism does not prescribe the actual content of most political issues, including social justice and questions related to multiculturalism. As was pointed out in previous chapters, a wide range of outcomes are compatible and consistent with liberal constitutionalism, but not required by the theory. Therefore, the weak understanding of reason in liberal constitutionalism gives rise to only modest substantive implications mainly confined to civil and political rights.
2. To ensure that the actual democratic deliberations are carried out in a way that is compatible with both the liberal principle of legitimacy and pluralism I have suggested a democratic model based on many of the procedures rooted in deliberative democracy, but without any references to the outcomes of the democratic process as representing a common good. Instead, the strongest justifiable notion of a common good in a pluralistic society is to think of the democratic system itself as representing the common good. Many of the deliberative procedures associated with deliberative democracy encourage wide participation in the political process and emphasize reasons and arguments rather

than appeals to emotion, rhetoric and ensure that certain influential groups cannot rig the political process to their own advantage. This concern fits well with the contractual emphasis on reasons. Wide participation and emphasis on reasons aims to ensure that political equality is realized and contributes to establishing an impartial political system. Such a political system will aim to ensure that all the relevant aspects of political issues will be discussed and that different views on political issues will be voiced. This does not necessarily mean that the actual quality of the outcomes of democratic deliberation will be more correct or closer to what is right. In short, deliberative procedures cannot ensure the quality of the actual outcomes of democratic decision-making. What it means is that the process aims to be impartial and fair to all citizens, and thus contribute to the realization of the ideal of political equality. The only thing democracy establishes is what the majority think is right, not what is objectively right.

3. This political order is built around civil and political rights, deliberative procedures, and a weak notion of the common good. Now, the remaining contentious issue is the role of those civil rights incorporated into the constitution. As we have seen, critics object to incorporating such rights either on the grounds that they are undemocratic, or that no consensus exists on what rights to include or exclude. Deliberative proceduralism relies on the plausibility of incorporating such rights and I have presented two arguments aiming to show that the differences between the critics and proponents of such rights are not as stark as often assumed. The first argument states that the justification of both civil and political rights is based on an appeal to fairness and equality. If this holds, then an important argument for rejecting civil rights is weakened. This does not answer the question of what rights to include or exclude, but if both civil and political rights are derived from a shared concern for fairness and equality, these two ideals give us an idea of what kind of rights ought to be included. The second argument holds that there is an analogy between contractualism and deliberative democracy. Both approaches are concerned with establishing a political order where partial concerns and the power of influential groups are curbed. The aim is a political order with wide participation and impartial procedures. These concerns are reflected in the same underlying thinking in both approaches. A main difference is that deliberative democrats believe that realizing the political process itself can achieve these aims, while contractualists believe that actual political deliberations must be



supplemented with a set of rights to promote impartiality. Contractualists think that actual political deliberations under certain circumstances can violate the ideal of impartiality, and must be supplemented by a set of fundamental rights. While deliberative democrats think that the conditions of actual deliberations will themselves satisfy the demands of impartiality. I have argued that in most cases deliberative procedures ensure adequate concern for impartiality. However, in some cases and concerning some issues of fundamental interest to the individual, I have argued that the hypothetical reasoning informing contractualism offers a supplement to the ideals of actual deliberations. Since both deliberative democracy and contractualism rely on some of the same underlying thinking, and if the justification of democracy and justice originate in the same concern for fairness and equality, the conclusion is that a set of civil rights does not conflict as strongly with a commitment to the authority of democracy as is often assumed.

These three points briefly summarised above attempt together to provide an answer to how a commitment to both justice and democracy can be combined in liberal constitutionalism. I should stress that these three points only show how the tensions can be minimized and are not meant to show that justice and democracy can easily be combined in a happy marriage. Rather, the point is to show that the conflicts between the competing demands from justice and democracy are not as dramatic and serious as is often alleged by many critics of liberal constitutionalism. Furthermore, the discussion in this thesis has shown that liberal constitutionalism is not out of tune with recent developments in democratic and political theory. It is possible to adapt the liberal constitutionalist framework to some of the concerns stressed by deliberative democrats and at the same time to be sensitive to the demands that arise from the pluralism of modern societies.

## **2. Politics and Philosophy**

I now want to conclude with some thoughts on the relationship between politics and philosophy and the tasks of political philosophy. A central argument in this thesis has been that it is relatively easy to reach an answer to what justice requires in the abstract, but it is much harder to arrive at clear answers as to what justice requires of us to realize political equality in specific societies. The solution to this question is to say that it is reasonable for citizens to disagree over what, for example, political equality

between men and women requires. I argued in Chapter three that it is clearly unreasonable to deny women equal political rights, and that justice requires political equality between men and women. However, it is a different issue whether political equality requires a reserved seat system for women in parliament or not. To hold the view that justice does not require a reserved seat system for women is not clearly unreasonable. To what extent it is reasonable or unreasonable depends on the interpretation and normative weight given to a wide range of empirical observations. Whether women ought to have reserved seats in the parliament depends on historical, economic and social contingencies open to a wide range of different interpretations.

Thus, determining what justice requires is a highly complex task. It is not clear at all that political philosophy can arrive at definite answers to this and many other similar questions regarding social justice and the status of religion, citizenship, and group rights (just to mention a few controversial issues in the contemporary political and philosophical debate). Ultimately, I argued that these issues ought to be settled through democratic procedures as there are a wide range of possible solutions to how to realize political equality among men and women and in short, democracy represents the best decision-making procedure to determine how a particular society ought to realize this ideal.

The observation of the difficulties associated with determining what justice requires in many specific cases I believe gives rise to two tasks for political philosophy. These two tasks broadly follow the distinction between the *a priori* and the empirical approach to justice discussed in Chapter three. The *a priori* approach to justice describes principles that can be derived from the use of reason alone. Examples are abstract and general principles about the wrongness of slavery and the equal moral value of each person and moral ideals such as equality, liberty and impartiality. In contrast, the empirical approach aims to go further by investigating how these abstract and general principles fare in actual societies. This is to ask questions about how equality is manifested in the various institutions and structures of social life. This includes, but is not restricted to, political equality, economic equality, gender and racial equality, etc. The aim is to analyse the extent to which the different institutions and structures of society embody and realize the ideals of impartiality, equality and liberty. I will now use the distinction between the *a priori* and the empirical method to describe how the perspective developed in this thesis thinks of the relationship between politics and philosophy and the tasks of political philosophy.

The first task is to map out the general and abstract principles and ideals for a political order. This is an *a priori* approach to political philosophy and is based on the use of reason without relying on extensive use of empirical evidence and discussions of actual political issues. The idea is, for example, to argue in favour of political equality between men and women or against slavery in a way that can be done mainly through the use of reason and without relying on the historical and social contingencies of particular societies. The *a priori* approach to political philosophy helps us to arrive at the general principles and ideals around which we think a political order ought to be built. A central task for political philosophy is to discuss the merits and demerits of political ideals and principles. Examples of this kind of political philosophy are Scanlon's contractualism, and Rawls's and Barry's theories of justice. Because this approach to political philosophy relies on abstract reasoning the validity of the conclusions are wide ranging and in principle universal. Concerning the two examples mentioned above, this is to say that slavery and political inequalities between men and women are unjust under all possible societies at all times. Although, this might sound like a strong conclusion, it is important to notice that establishing these principles does not say anything about what exactly political equality between men and women, for example, means in particular societies.

A second task is to apply the tools within the more abstract theories to practical cases such as, for example, social justice and questions concerning multiculturalism. Here usually a specific theory is applied on a controversial political question, and the aim is to arrive at an answer to what the right solution to this particular question ought to be. Such an analysis will consist of a mix of principles and social and historical contingencies. The moral principles and ideals within an *a priori* theory are combined with the particular circumstances in a specific society. An example of such an analysis is a discussion of the justifiability of reserved seats in parliament for women in Western societies. An analysis of this kind is likely to rely on the interpretation of social and historical contingencies and many of these contingencies are open to different interpretations. Therefore, the conclusions and underlying assumptions reached by an analysis of this kind can easily be questioned because the evidence does not necessarily converge. Thus, the validity of the conclusions reached by this type of analysis is limited to the particular case(s) discussed and cannot therefore be generalized to other societies with different social conditions and history. Examples of this kind of political philosophy discussed in this thesis are Barry's books on social

justice and multiculturalism. Often there will be more than one answer to how social justice and political equality can be realized, and the answers offered by political philosophy concerning these cases are not authoritative in the way that the answers of the *a priori* approach to political philosophy aim to be.

Both these tasks are equally important. To assess the legitimacy of a political order some guiding principles are necessary and the *a priori* approach provides a set of principles offering a framework for assessing the actual practices in a society. Ultimately, what matters is the extent to which it is possible to arrive at a political order that is justifiable and legitimate, and to achieve this, it is necessary to analyse some of the particular practices in actual societies to determine if the practices are consistent with the ideals. Thus, both the *a priori* and the empirical approach are needed in political philosophy. This aims to show how politics and philosophy are connected. An analysis of a specific practice must start from certain ideals and principles, and the purpose of the *a priori* approach is ultimately to define a morally justifiable political order. In one way, both the *a priori* and the empirical approach are present in this thesis. The discussion of reason in the first chapters aimed to make sense of some of the abstract and general principles and ideals of liberal constitutionalism. While the discussion in the later chapters looked at how these ideals and principles could be implemented in a political order. Thus, chapters one to four were mainly pre-occupied with the role of reason and abstract and general principles underlying the liberal constitutionalist approach to political theory. Chapters five to seven aimed to show that the notion of reason and a commitment to pluralism, liberal legitimacy, fundamental rights, and democracy, could be combined in a model of democracy.

Following the distinction between the two tasks of political philosophy above, the clearest political implication is to emphasize the importance of democracy and political equality. At least two important implications follow from this. First, the ideal of political equality is of great importance for the legitimacy of a democratic system. Political equality ensures legitimacy, and the strong notion of political equality advanced here also contributes to ensuring that the outcomes of the democratic process are acceptable from a perspective of social justice and multiculturalism. Political equality understood in a strong sense will avoid a situation in which wealthy and influential cultural groups can skew the political process to their own advantage and have stronger influence than their size suggests they should.

It is important to notice that a strong notion of political equality is an important element in playing down the tension between the competing ideals of justice and democracy. Political equality is one of the important meeting points between these two ideals, and is foundational to both, and I believe this to be an important insight of this thesis. We have seen that both for liberal constitutionalism and contemporary democratic theory an important premise is the idea of political equality. Neither liberal constitutionalism nor contemporary democratic theory can get by without this indispensable premise. Despite this important shared starting point we have seen that liberal constitutionalism and contemporary democratic theories interpret the requirements of this premise differently. Liberal constitutionalism holds that political equality requires a set of constitutionally secured civil and political rights, while many democratic theorists reject this interpretation and hold instead that this undermines the idea of democratic authority. One of the important aims of this thesis has been to break down some of the barriers between these two positions and to argue that the opposition between them is not as stark as often assumed.

### **3. Final Reflections**

The ideas of liberal constitutionalism have had a continuous impact on political thinking for centuries at both practical and theoretical levels. Its practical and theoretical success has made it into a mainstream approach to political theory. Furthermore, its success is closely tied to the development of modernity, and liberal constitutionalism can be said to have offered a systematic way to think about politics under modern conditions. Today, modern societies are marked by both growing social and economic inequalities and by increasing political and moral disagreement. These prevalent features of modern societies require both practical and theoretical responses. Growing social and economic inequalities may not represent injustices in themselves and disagreement may not threaten the stability of society. However, political philosophy can contribute to how to understand and clarify the normative implications of these trends in modern society. This might not change things for the better by itself, but it can perhaps point in the right direction. Being aware of the right direction is the first step towards political change, and is as important as directed action towards change. If political philosophy can contribute by clarifying political concepts and pointing out the direction for possible political change that in itself is a highly valuable contribution to politics and society.

What liberal constitutionalism offers is a sophisticated theory that defines the scope of justice and the scope of politics that fits with modern society. This is not an easy task as modern societies are increasingly complex and interwoven. Thus, defining the scope of justice becomes an onerous task and the grave difficulty involved can discourage even the most optimistic. Despite the obvious reasons for feeling discouraged, ideas and visions are to some extent the starting point for all human actions, including politics. Because ideas and ideals have this importance, studying them matters, at least in the long run. Bearing this in mind might give some consolation when studying the ideals of justice and democracy just feels like another quixotic quest for saving the world.

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